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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 715

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*, *Appellees*.

On Appeal from the United States District Court for the Middle District of Florida

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Florida East Coast Railway Company (East Coast) appeals from the judgment of the United States District Court for the Middle District of Florida, entered June 24, 1966, dismissing a complaint to set aside orders of the Interstate Commerce Commission. East Coast submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS

The opinion of the three-judge District Court entered on June 24, 1966, is not yet reported. That opinion and the judgment of the District Court are printed as Appendix A (pp. 1a-6a, *infra.*). The report of the Interstate Commerce Commission, Division 3, dated March 17, 1965, is reported at 327 I.C.C. 1 and printed as Appendix B (pp. 7a-18a, *infra.*). The order entered by the Commission in connection with its report is printed as Appendix C (pp. 19a-20a, *infra.*). The report and recommended order of the Commission's Hearing Examiner are printed as Appendix D (pp. 21a-40a, *infra.*).

JURISDICTION

This action was brought under 28 U.S.C. §§ 1336 and 2321-25 to set aside orders of the Commission entered under section 3(5) of the Interstate Commerce Act, 49 U.S.C. § 3(5). The United States and the Commission answered. Seaboard Air Line Railroad Company (Seaboard), the Greater Miami Traffic Association, and Dade County, Florida, intervened as parties defendant.

The judgment of the District Court was entered June 24, 1966. Notice of appeal was filed August 23, 1966. The Supreme Court has jurisdiction under 28 U.S.C. §§ 1253 and 2101(b) to review the judgment below on direct appeal. This jurisdiction is sustained by decisions in *Western Pac. R.R.* v. *United States,* 382 U.S. 237 (1965), and *Chicago & N.W. Ry.* v. *Chicago, M., St. P. & Pac. Ry.,* 380 U.S. 448 (1965).

STATUTES INVOLVED

Section 3(5) of the Interstate Commerce Act, 49 U.S.C. § 3(5), is the principal statutory provision involved. Sections 1(18)-(20) and 1(22) of the Act, 49 U.S.C. §§ 1(18)-(20), 1(22), are also pertinent to the issues raised. Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 1009(c), specifies the type of Commission orders that are properly the subject of judicial review. All of these statutory provisions are set out in Appendix E (pp. 41a-44a, *infra*.).

QUESTION PRESENTED

Is an order of the Commission authorizing certain rail operations final and properly the subject of judicial review if the overall plan of rail operation requires the construction of connecting rail lines for which no certificate of public convenience and necessity under section 1(18) of the Act has been sought or issued, and the Commission has reserved decision on the need for and issuance of any such certificate?

STATEMENT OF THE CASE

East Coast and Seaboard are interstate railroads. Both carriers operate main rail lines between Miami and Jacksonville, Florida, including directly parallel lines along the east coast of Florida between Miami and West Palm Beach. East Coast's line continues north from West Palm Beach along the east coast of Florida to Jacksonville. This line and several short branch lines springing from it constitute East Coast's entire railroad system. Freight traffic moving to or from points beyond East Coast's system is interchanged at Jacksonville with Seaboard, Atlantic Coast Line Railroad Company, and the Southern Railway

Company and its affiliates in the Southern Railway System. Seaboard also connects at Jacksonville with the latter two rail systems, as well as with its own system of lines extending into the states of Virginia, North Carolina, South Carolina, Georgia, and Alabama. East Coast and Seaboard are thus direct competitors for rail traffic originating at or destined to Miami to the extent that such traffic moves to and from points beyond Jacksonville, or points in Florida commonly served by East Coast and Seaboard. See *Seaboard Air Line R.R.—Merger—Atlantic Coast Line R.R.*, 320 I.C.C. 122 (1963), *rev'd sub nom. Florida East Coast Ry.* v. *United States*, 242 F. Supp. 14 (M.D. Fla.), *vacated per curiam sub nom. Seaboard Air Line R.R.* v. *United States*, 382 U.S. 154 (1965), *aff'd sub nom. Florida East Coast Ry.* v. *United States*, No. 64-64-Civ. J., M.D. Fla., June 8, 1966, *appeal docketed*, 35 U.S.L. Week 3141 (U.S. Oct. 18, 1966) (Nos. 638 and 641).

East Coast and Seaboard both serve the existing port at Miami by operating over tracks of the Miami Municipal Railway. *Florida East Coast Ry. Operation*, 170 I.C.C. 171 (1931); *Miami Municipal R.R. Extension*, 170 I.C.C. 175 (1931). The Seaport Department of Metropolitan Dade County proposes, however, to transfer all port activities at Miami to new port facilities, which it is constructing at Dodge Island, located in Biscayne Bay, south and east of the existing port (Tr. 29, 75-77).* Parallel vehicular and railroad bridges will join Dodge Island with the mainland to

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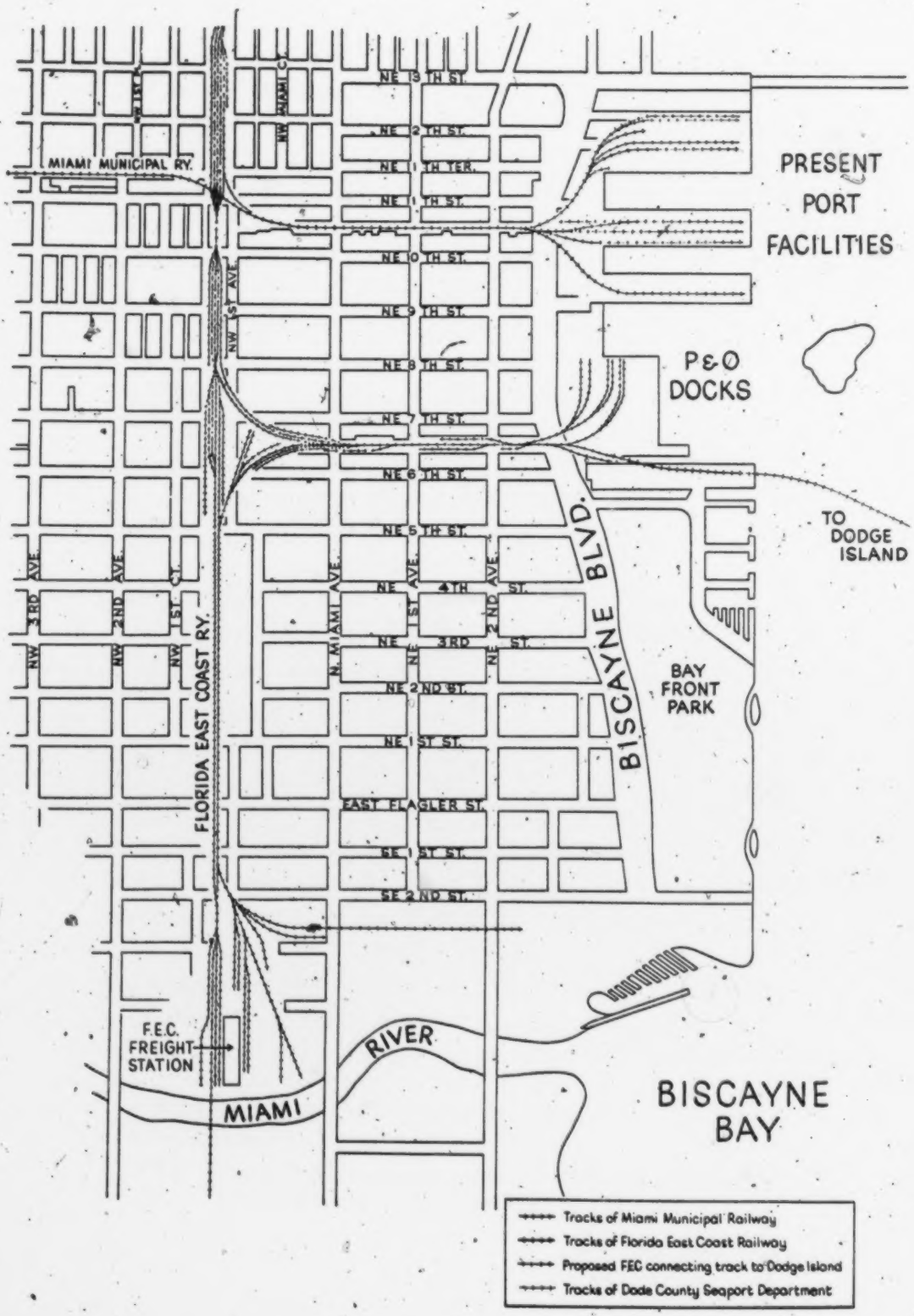
* Reference to the record will be indicated by the following abbreviations:

Tr. Transcript of hearing before the Commission's Examiner.
Ex. Exhibits received in evidence at the hearing.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NE 1ST ST.
EAST FLAGLER ST.
SE 1ST ST.
SE 2ND ST.
MIAMI MUNICIPAL RY.
PRESENT PORT FACILITIES
P&O DOCKS
TO DODGE ISLAND
BISCAYNE BLVD.
BAY FRONT PARK
FLORIDA EAST COAST RY.
N. MIAMI AVE.
NW 1ST AVE.
NW 2ND AVE.
NW 3RD AVE.
NW 1ST CT.
NW 2ND CT.
NW 3RD CT.
NW 4TH CT.
F.E.C. FREIGHT STATION
MIAMI RIVER
BISCAYNE BAY
Tracks of Miami Municipal Railway
Tracks of Florida East Coast Railway
Proposed FEC connecting track to Dodge Island
Tracks of Dade County Seaport Department

afford access to the port by motor and rail common carriers (Tr. 84-85). The Seaport Department will provide tracks on Dodge Island and on the bridge to the mainland. The map opposite this page depicits existing and proposed rail lines in downtown Miami, showing their location with respect to the two port facilities.

In August 1962, the Seaport Department requested East Coast and Seaboard to make arrangements for providing rail service to the new port. East Coast responded with a proposal to reach the railroad bridge to Dodge Island by building at its expense a short connecting track from the end of the spur that springs from East Coast's north-south main line at the intersection of 8th Street and 1st Avenue and continues eastward between N.E. 6th and 7th Streets, terminating at the P&O Docks (Map). East Coast proposed to move its own cars and those of Seaboard to and from the port via this route. Seaboard's cars would be moved between the carriers' existing interchange point at N.W. 11th Street and the port for a charge reflecting East Coast's costs in performing such service (Tr. 201, 203-205).

Seaboard responded to the Seaport Department's request with a proposal (1) to construct a connecting track from a point on the line of the Miami Municipal Railway west of the intersection of that line with East Coast's north-south main line to the main line track of East Coast in the vicinity of N.W. 11th Street and 1st Avenue (Map), and (2) to construct at joint expense with East Coast the connecting track leading to the western abutment of the Dodge Island railroad bridge. Seaboard insisted that it be permitted to move its cars to and from the port with its own locomotives,

using these two connecting tracks in conjunction with East Coast's existing tracks, which constitute the major portion of the route. Seaboard rejected East Coast's proposal to move both carriers' cars to and from the port with East Coast locomotives and over East Coast tracks.

Seaboard sought to implement its proposal by filing with the Commission on February 25, 1963, an application under section 3(5) of the Interstate Commerce Act, 49 U.S.C. § 3(5), for an order requiring East Coast to permit Seaboard to operate as a rail carrier over the involved tracks of East Coast.[1] Seaboard did not at that time, and has not since, filed any application seeking a certificate under section 1(18) of the Act, 49 U.S.C. § 1(18), authorizing it to construct and operate over the connecting tracks essential to its proposed route.[2] East Coast protested Seaboard's application under section 3(5). The Greater Miami Traffic Association, on behalf of Metropolitan Dade County and the Seaport Department, intervened in support of Seaboard.

Hearings were held before a Commission Hearing Examiner, who recommended that the application be granted (Appendix D, pp. 21a-40a). East Coast took exception to the Examiner's recommended order; Seaboard and the Greater Miami Traffic Association replied.

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[1] The basic prerequisite for approval of the quasi-condemnation under section 3(5) is a finding by the Commission that the operational plan is "in the public interest."

[2] The standard of proof required for a certificate under section 1(18) is a showing that "present or future public convenience and necessity require or will require" the proposed construction and operation.

Division 3 of the Commission affirmed the result recommended by the Examiner, concluding that use of East Coast facilities by Seaboard was reasonably required in the public interest, and that Seaboard's proposed operations would be practicable and would not substantially impair the ability of East Coast to handle its own business (327 I.C.C. at 8; Appendix B, p. 17a). The Commission prefaced its conclusion with the following discussion:

> The application under consideration constitutes a portion of an overall plan to afford continued joint service to the new port . . . However, no application is pending for consideration of other essential track construction projects, nor is our approval of the application here to be construed as authorizing such construction (327 I.C.C. at 7; Appendix B, p. 15a) (footnote omitted).

The Commission also conditioned Seaboard's use of East Coast tracks (1) upon terms and compensation to be agreed upon by Seaboard and East Coast, and thereafter found by the Commission to be just and reasonable; or alternatively (2) upon such terms and compensation as the Commission may fix as just and reasonable after further hearing at the request of East Coast and/or Seaboard (Appendix C, p. 19a). Compensation and terms have not been fixed under either alternative; nor has either party petitioned for further hearing on these issues.

East Coast petitioned for reconsideration by the full Commission on the ground that the proceeding involved issues of general transportation importance. The petition was denied.

On May 26, 1965, East Coast filed its complaint in the court below to set aside and enjoin the Commission's order granting Seaboard's section 3(5) applica-

tion. The District Court dismissed the complaint and affirmed the Commission's order in an opinion and judgment entered June 24, 1966. The District Court held that the Commission's order was final and judicially reviewable, and that the Commission was empowered under section 3(5) to assume jurisdiction over Seaboard's application and to require East Coast to permit use of its tracks by Seaboard (Appendix A, pp. 3a, 4a). The District Court concluded "that the Commission's findings are amply supported by the record considered as a whole" (Appendix A, p. 6a).

THE QUESTION IS SUBSTANTIAL

Is an order of the Commission authorizing certain rail operations final and properly the subject of judicial review if the overall plan of rail operation requires the construction of connecting rail lines for which no certificate of public convenience and necessity under section 1(18) of the Act has been sought or issued, and the Commission has reserved decision on the need for and issuance of any such certificate? It is the position of appellant that the court below erred in answering this question affirmatively. It is also appellant's position that the lower court's error may appropriately be corrected by this Court summarily. See *United States* v. *Bliss & Laughlin, Inc.*, 371 U.S. 70 (1962); *Arrow Transportation Co.* v. *Cincinnati, N.O. & T.P.R.R.*, 379 U.S. 642 (1965); *Seaboard Air Line R.R.* v. *United States*, 382 U.S. 154 (1965).

The issue of finality is substantial, not merely academic. The only part of Seaboard's overall proposal that has been determined by the Commission's order is whether it is in the public interest to require East Coast to permit use of its tracks by Seaboard as

part of Seaboard's route to the new port. The Commission concedes that its determination covers only part of an overall operational plan, which can be implemented only after essential connecting tracks have been constructed by Seaboard under a certificate "that the present or future public convenience and necessity require or will require" construction and operation of such tracks. The overall plan thus must be shown to be required by "strong and urgent public need."[8] This showing has not been made; in fact, the overall plan has not even been presented for adjudication.

The failure of Seaboard to present its section 1(18) application and the willingness of the Commission to decide the section 3(5) application in a vacuum have precluded sensible administrative determination of the overall proposal in terms of the applicable standard of public convenience and necessity. East Coast, in the action below and in this appeal, has sought to prevent the Commission's anomalous procedure from creating a roadblock to meaningful judicial review and further unnecessary litigation. East Coast was compelled to challenge the Commission's order to guard against the apparent determination of legal rights in that order. The use of tracks pursuant to section 3(5) would not be in issue in the Commission's later separate determination of the remaining portions of Seaboard's proposal. The lower court's decision has not removed the dilemma posed by the Commission's severed treatment of Seaboard's overall proposal. This Court has, in the past, provided for consolidated judicial review

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[8] *Northern Pac. Ry.—Construction*, 295 I.C.C. 281, 295 (1956). The Commission has frequently defined public convenience and necessity as requiring a higher degree of proof than mere consistency with the public interest. *Baggett Transportation Co.—Purchase—Bishop*, 36 M.C.C. 659, 664 (1941).

of two separate Commission actions in which the later action perfects and makes imminent the injury threatened, but not perfected, in the first. *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, *rehearing denied*, 353 U.S. 989 (1957). East Coast therefore appeals to this Court to correct the error below by summarily vacating the judgment of the District Court and remanding the case to that court with directions to review the challenged order when and if it becomes final as a result of further adjudication on Seaboard's overall plan. This relief will prevent unnecessary and inconclusive litigation and will assure meaningful and simultaneous judicial review of all relevant legal issues raised by Seaboard's overall proposal to provide rail service at the new port.

The Commission's order states: "*It is further ordered*, that the Florida East Coast Railway Company be, and it is hereby, notified and required to permit the Seaboard Air Line Railroad Company to use that portion of the tracks and terminal facilities, as described in the report . . ." (Appendix C, p. 19a). The track "described in the report" is that portion of East Coast main track that Seaboard would reach via "a 585-foot connecting track in the vicinity of N.W. 11th Street and N.W. 1st Avenue," which Seaboard plans to construct, own, and maintain (327 I.C.C. at 5; Appendix B, p. 12a). The connecting track does not now exist.[4]

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[4] East Coast would have to reduce the length of two yard tracks by approximately 110 feet each to allow construction of a southbound switching track onto East Coast's main line track at this point (Tr. 34). Seaboard has not approached the City of Miami for a permit to construct this connection (Tr. 143), and has not contacted the two property owners (one of whom is East Coast) whose land will be traversed by the proposed connection (Tr. 144).

Seaboard can not construct that connection—and consequently use East Coast's track—unless and until it obtains from the Commission, pursuant to the provisions of section 1(18) of the Act, a certificate authorizing such construction. The Commission, moreover, has expressly withheld its determination of the section 1(18) construction issue: "no application is pending for consideration of other essential track construction projects, nor is our approval of the application here to be construed as authorizing such construction" (327 I.C.C. at 7; Appendix B, p. 15a).

The District Court found neither the absence of this connecting track, nor the possibility that the Commission might ultimately withhold approval of the construction of that track, a bar to reviewability of the Commission's order. The Court held: "Seaboard would be able to serve the port by obtaining acceptance of a different type of connection or by using a preexisting, though possibly less efficient, connection" (Appendix A, p. 5a). The first alternative perpetuates, rather than settles, the question of finality of the Commission's order. If Seaboard is to obtain "acceptance of a different type of connection," that will be accomplished through further adjudication by the Commission, after which the challenged order, read in light of the Commission's further action, might be considered to have become final. The lower court's second suggested alternative can not lawfully be accomplished under the existing order. The Commission has ordered East Coast to permit Seaboard to use that portion of East Coast tracks "as described in the report" (Appendix C, p. 19a). Seaboard has not requested, nor has the Commission authorized, use of East Coast tracks via any other connection. The only use autho-

rized must be accomplished via a connection, which does not exist and for which no certificate of public convenience and necessity has been sought or issued.

The District Court relied on this Court's decision in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942), to support its holding that the Commission's order is final and reviewable (Appendix A, p. 3a). This Court stated in *Columbia Broadcasting System:*

> The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control (316 U.S. at 425).

Neither of the criteria established by this Court in *Columbia Broadcasting System* is satisfied by the order here. This order does not "attach legal consequences to action taken in advance of other hearings and adjudications that follow" simply because the only action giving rise to legal consequences—Seaboard's use of East Coast tracks—can not be taken unless and until Seaboard is authorized to and does, in fact, construct the connection essential for reaching East Coast tracks. With respect to the criterion that the challenged order must "purport to control" future hearings and adjudications under section 1(18), the District Court expressly found this not to be so:

> Even if Commission approval is needed, we cannot presume that the Commission will disregard its obligations to give East Coast a fair hearing and

> to apply the stricter standard of "public convenience and necessity." After such a hearing, if one is needed, the Commission could, consistent with the order now under review, withhold its approval of the construction . . . . (Appendix A, p. 5a).

The test laid down in *Columbia Broadcasting System* supports appellant's contention that the order of the Commission is not reviewable at this time.

The non-finality of the order is further emphasized by the Commission's explicit retention of jurisdiction "to reopen the proceeding for further hearing looking to a determination and prescription of terms and compensation" (327 I.C.C. at 9; Appendix B, p. 18a). Section 3(5) provides that terms and compensation may be agreed upon by the parties[5] or fixed by the Commission, but in either event, "such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced." Terms and compensation have not been set, much less "paid or adequately secured."

The totality of circumstances surrounding implementation of the Commission's order are these: East Coast must permit use of its tracks by Seaboard *if* the Commission authorizes construction of Seaboard's connecting track and Seaboard does, in fact, construct that track, or *if* the Commission authorizes Seaboard to reach East Coast tracks via some other connection; and *if* terms and compensation are agreed upon by the parties and found to be just and reasonable by the

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[5] The Commission has ordered that, even if the parties agree on terms and compensation, their agreement must be submitted to the Commission for a finding that the provisions of that agreement are just and reasonable (Appendix C, p. 19a).

Commission, or are fixed by the Commission; and *if* such compensation is paid or adequately secured prior to Seaboard using the East Coast tracks. *Cf., Eccles* v. *Peoples Bank,* 333 U.S. 426, 432 (1948). The concurrence of these contingent events must await further action by the Commission. Until the Commission takes such action, the challenged order is not final, nor ripe for plenary review.

CONCLUSION

The judgment of the District Court should be vacated and the case remanded to that court with directions to review the challenged order when and if it becomes final.

Respectfully submitted,

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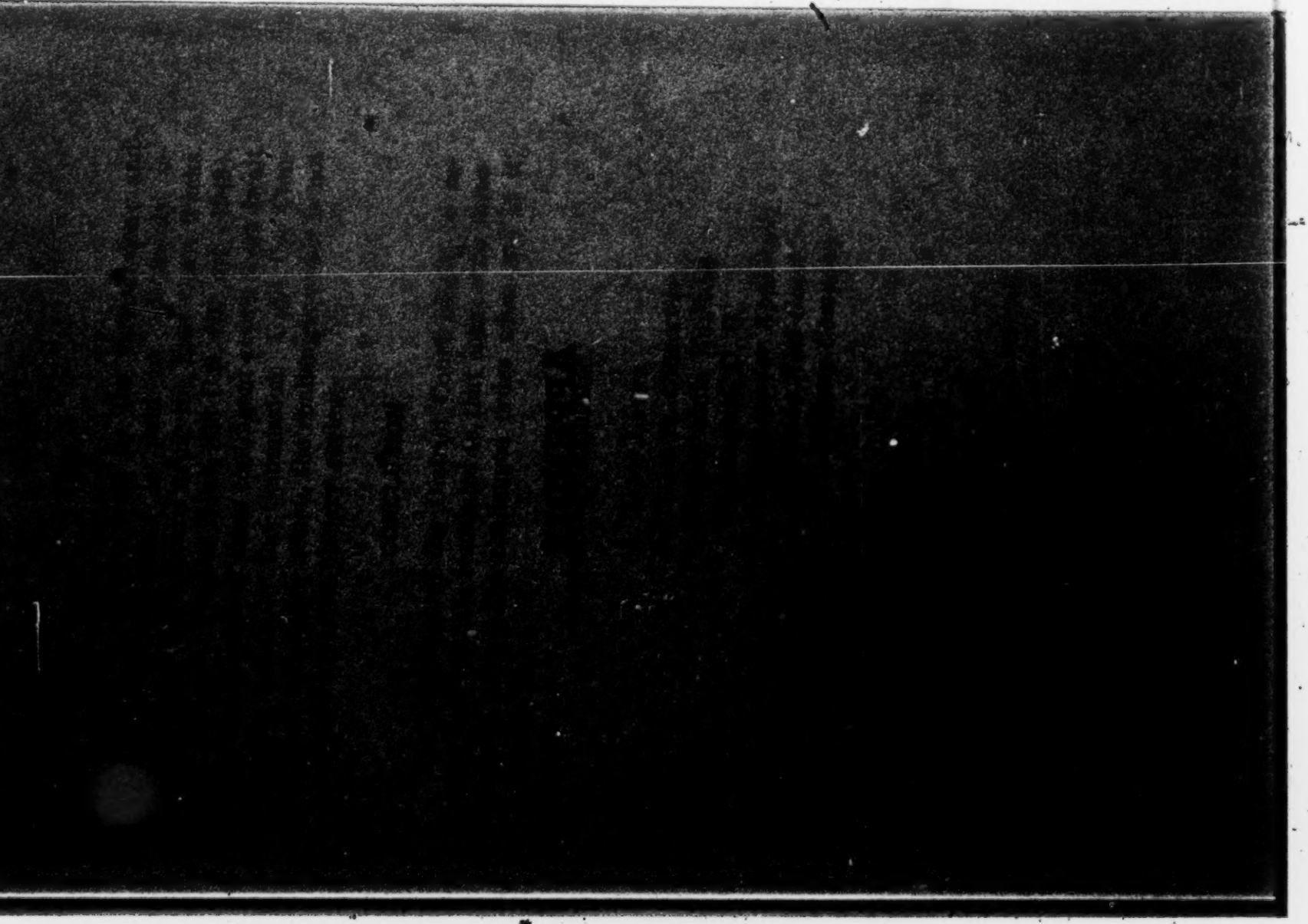

APPENDIX A

[—— F. Supp. ——]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 65-186-Civ-J

FLORIDA EAST COAST RAILWAY COMPANY, *Plaintiff*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*.

Opinion

Before Jones, Circuit Judge, and McRae and Young, District Judges.

McRAE, District Judge.

Florida East Coast Railway Company (East Coast) brought this action, seeking judicial review of an order of the Interstate Commerce Commission that requires East Coast to permit Seaboard Air Line Railroad Company (Seaboard) to operate trains over certain railroad tracks owned and used by East Coast in Miami, Florida.

Currently, both Seaboard and East Coast provide rail transportation to and from the present municipal port in Miami, using the tracks of the Miami Municipal Railroad. New port facilities are being constructed in Miami on Dodge Island, however, and all Miami port activities will be transferred to Dodge Island when these facilities are completed. The Dade County (Miami) Seaport Department has requested that both Seaboard and East Coast provide rail service to the new port.

The Seaport Department is constructing railroad track from the island to the mainland, leaving a short gap be-

tween the end of its track and an East Coast spur track. East Coast proposes to close the gap by building a connecting track. Seaboard will have no access to the new port without substantial track construction in downtown Miami unless it is able to use 3220 feet of East Coast tracks, some main line and some spur.

Seaboard, therefore, applied to the Interstate Commerce Commission under § 3(5) of the Interstate Commerce Act, 49 U.S.C. § 3(5), for permission to use these East Coast tracks. Section 3(5) provides in part:

> If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers . . . .

Hearings were conducted before a hearing examiner, who recommended approval of Seaboard's application to use East Coast tracks. The Commission agreed, finding, among other things, that Seaboard's proposal was in the public interest, was practicable, and would not substantially impair the ability of East Coast to handle its own business.

Before determining whether the record considered as a whole supports these findings, we first should consider certain preliminary issues raised by East Coast: it contends that the Commission's order is not reviewable at this time, that the Commission had no jurisdiction to enter the order, and that the order deprives East Coast of property without due process of law.

Section 3(5) of the Interstate Commerce Act provides that the use of another railroad's track is to be "on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required . . . . Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced." In light of this provision, the Commission retained jurisdiction for the purpose of reopening the proceedings and thereupon determining the proper compensation if the carriers could not reach agreement.

East Coast argues, therefore, that the Commission's order is not final and hence not now reviewable. We cannot agree. "The true test [of ripeness] is the substantiality of present or imminent harm which the administrative action inflicts on the plaintiff." 3 Davis, Administrative Law § 21.07, at 176-77 (1958). See Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 424-25 (1942). One key factor is whether the order determines legal rights. 3 Davis, *supra*, at 177. The present order clearly does so, ordering one carrier to allow another carrier to use its track. This determination of the parties' legal rights may be the final action taken by the Commission in this dispute, as the parties may agree upon the terms of compensation. Most important, the effective date of the order does not depend on the establishment of the terms of compensation as long as the use of East Coast track is "adequately secured . . . before the said use shall be commenced." See also Missouri-Kan.-Tex. R.R. v. Kansas City Terminal Ry., 198 I.C.C. 4, 5 (1933) (track used for 4 years before compensation settled).

East Coast's argument that the Commission had no jurisdiction under § 3(5) revolves around the interpretation of the words "terminal facilities" as used in that section. A railroad must be one "owning or entitled to

the enjoyment of terminal facilities" before it can be ordered to let another railroad use the "terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal." East Coast contends that the only terminal facilities involved in this case are those owned by the Seaport Department, which facilities East Coast neither owns nor is entitled to enjoy.

Such a construction, however, is much too narrow. The statutory language explicitly indicates that the words "terminal facilities" do not refer solely to the terminal itself, since such facilities are said to include main-line track outside the terminal. Certainly, if main-line track may be part of the terminal facilities, spur track may be also. The key is the use to be made of the track.

In the present case, Seaboard proposes to use the East Coast tracks to transfer cars from the port to its freight yards, where the cars will then be switched around and made into trains with destinations outside the Miami area. East Coast will use portions of the tracks in the same way and presently uses the tracks to serve industries near its Miami terminal. The fact that East Coast also uses portions of the tracks as main-line track is irrelevant.

The fact that ownership of the terminal and ownership of the terminal facilities sought to be used are in different companies likewise is irrelevant. No policy has been advanced, and we cannot conceive of one, for limiting the statute's operation to the single-owner situation.

Under these circumstances, the tracks owned by East Coast and sought to be used by Seaboard are "terminal facilities" within the meaning of § 3(5). *Accord,* City of Milwaukee v. Chicago & N.W. Ry., 283 I.C.C. 311 (1951).

East Coast further argues that the order deprives it of property without due process of law. In order for Seaboard to move its trains on and off the East Coast tracks sought to be used, construction of a short connecting track

will be desirable or possibly necessary. East Coast urges that § 1(18) of the Interstate Commerce Act requires Commission approval (using the more strict "public convenience and necessity" standard) before the connection can be built, that no request has been made to the Commission for its approval, but that the present order conclusively binds the Commission to grant such approval in the future, thereby depriving East Coast of the right to a full and fair hearing on Seaboard's application. Seaboard contends that connection comes within the § 1(22) exemption, obviating the need of Commission action.

We need not decide, however, whether the proposed construction comes within § 1(18) or § 1(22), for East Coast's complaint of the lack of due process is premature. Even if Commission approval is needed, we cannot presume that the Commission will disregard its obligations to give East Coast a fair hearing and to apply the stricter standard of "public convenience and necessity." After such a hearing, if one is needed, the Commission could, consistent with the order now under review, withhold its approval of the construction, but Seaboard would be able to serve the port by obtaining acceptance of a different type of connection or by using a preexisting, though possibly less efficient, connection. In any event, East Coast can complain about the denial of a fair hearing and the use of improper standards only after they occur. They presently have not.

On the merits, after considering Seaboard's proposal, East Coast's counterproposal (to let East Coast move the Seaboard traffic to and from the port), and testimony supporting various positions, including that of the intervenor Greater Miami Traffic Association (on behalf of Dade County and the Seaport Department), the Commission made its findings, including ones that the proposed use of East Coast track by Seaboard was in the public interest, was practicable, and would not substantially impair the ability of East Coast to handle its own business. After

reviewing the record, we conclude that the Commission's findings are amply supported by the record considered as a whole. The Commission's order, therefore, should be approved and the complaint should be dismissed.

Judgment will be entered for Defendants in accordance with the present opinion.

Judgment

In accordance with the Opinion filed herein this day, it is

ORDERED AND ADJUDGED that judgment is hereby entered for defendants United States of America and Interstate Commerce Commission, and this action is dismissed.

ENTERED at Jacksonville, Florida, this 24th day of June, 1966.

APPENDIX B

Interstate Commerce Commission Reports—Motor Carrier Cases

FINANCE DOCKET No. 22479

SEABOARD AIR LINE RAILROAD COMPANY—USE OF TERMINAL FACILITIES OF FLORIDA EAST COAST RAILWAY COMPANY

Decided March 17, 1965

Use by Seaboard Air Line Railroad Company of certain tracks and facilities of Florida East Coast Railway Company at Miami, Fla., found to be reasonably required in the public interest and to be practicable without substantially impairing the ability of the Florida East Coast to handle its own business. Conditions prescribed.

Richard A. Hollander for applicant.
Roland A. Smith for intervener in support of applicant.
A. Alvis Layne for intervener in opposition.
J. W. Hayes, T. C. Bolin, J. R. Bailey, Ben E. LeFeat, Cecil Johnson, W. T. Kitt, Dale McLaine, John S. Fetters, Benjamin P. Weinstock, L. W. Hughes, E. A. Glenn, and *Hugh O. Van Arsdall, Sr.*, for railway labor organizations.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONER TUGGLE, MURPHY, AND WALRATH

MURPHY, *Commissioner:*

Exceptions to the examiner's report and recommended order finding that use by the Seaboard Air Line Railroad Company (the Seaboard) of certain tracks and facilities of the Florida East Coast Railway Company (the East Coast) would be in the public interest, including a request

for oral argument, were filed by the East Coast; and the Seaboard and the Greater Miami Traffic Association (the association) on behalf of Metropolitan Dade County, Fla., and of the Dade County Seaport Department (the department), replied.

By application filed February 25, 1963, under the provisions of section 3(5) of the Interstate Commerce Act, the Seaboard requests an order requiring the East Coast to permit it to operate over approximately 3,220 feet of the East Coast's track at Miami, Fla.[1] Applicant also requests that we fix just and reasonable terms and compensation for the use of such track. Use of the facilities allegedly will be necessary in order for the Seaboard to serve the new port facilities now under construction at Dodge Island. The association intervened in support of the Seaboard's proposal. Hearings were held, and briefs were submitted by the Seaboard, East Coast, and the association. Representatives of various railway labor organizations appeared in the interest of railroad employees. We do not believe that oral argument is necessary for a proper disposition of the issues in this proceeding. The request of the East Coast, therefor is, accordingly denied.

The positions of the parties and the facts pertinent thereto are set forth in detail in the examiner's report and will be repeated only to the extent necessary for clarity of discussion. His findings of fact as amplified herein are adopted as our own.

On exceptions, the East Coast questions our jurisdiction in this matter alleging that the involved East Coast tracks are not terminal facilities; and that the department's port facilities at Dodge Island are not railroad terminal facilities either owned by the East Coast or over which the East Coast is entitled to handle its own business. Similarly, the classification of the department's facilities

[1] Unless otherwise indicated, all points are in Miami.

as terminal facilities is questioned because no authority from this Commission for their construction as part of the plant of a common carrier by railroad has been requested or obtained. As a result, the East Coast argues that the basic prerequisite for a finding under section 3(5), the existence of terminal facilities owned by the carrier against whom the order will become effective, is lacking.[2]

The department's facilities on Dodge Island are to be used primarily for serving users of a new port, and, in this respect, the operation at the department's facility will be little different from that conducted at the old port. See *Miami Municipal R. Extension,* 158 I.C.C. 169 and 170 I.C.C. 175, and *Florida East Coast Ry. Co. Operation,* 170 I.C.C. 171. Inasmuch as the use of the facilities, in terminal operations, rather than their classification by the parties is determinable, *Clinchfield R. Co. Abandonment,* 295 I.C.C. 41, 44, for the purposes of this proceeding, we find that the department's trackage constitutes terminal facilities as contemplated by section 3(5) of the act.

The fact that the East Coast does not own the facilities at the port or that it is not entitled as a matter of right to enjoyment of these facilities does not affect our jurisdiction under section 3(5) of the act. The basis of the East Coast's opposition to this application is that as the sole rail carrier to have physical connections with the new port, it can adequately handle all rail traffic to and

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[2] Section 3(5), as pertinent, is as follows:

If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a *common carrier by railroad owning or entitled to the enjoyment of terminal facilities* to handle its own business, it shall have power by order to require the *use of any such terminal facilities,* including main-line track or tracks for a reasonable distance, outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers * * *. [Emphasis supplied.]

from the port, including the switching of Seaboard cars. The plans of the port authority and of the East Coast contemplate the East Coast's use of the port terminal. In addition, the East Coast tracks involved herein, being used as they are entirely for serving shippers in the city of Miami and the area of the port, can themselves be considered terminal facilities; but whether they be considered terminal facilities of the East Coast or main-line track leading to the port's terminal facilities, they are within the scope of section 3(5). It is not required that the terminal facilities and the tracks for a reasonable distance outside of such terminal be owned by the same carrier. *Chicago & Alton R. Co.* v. *Toledo, P. & W. Ry. Co.*, 146 I.C.C. 171, 177. We, therefore, conclude that determination of the Seaboard's use of the East Coast's tracks as proposed is within our jurisdiction under section 3(5) subject to the prerequisite conditions and circumstances stated therein; namely, that the use sought be in the public interest and practicable without substantially impairing the ability of the East Coast to handle its own business. See *City of Hialeah, Fla.*, v. *Florida East Coast Ry. Co.*, 317 I.C.C. 34, 36; *Use by Erie of Niagara Junction Ry. Co. Terminals*, 269 I.C.C. 493, 499.

The present port of Miami, owned and operated by Metropolitan Dade County, is located between N. E. 9th and 12th Streets, east of Biscayne Boulevard. Over the past 34 years, both the Seaboard and East Coast have served the port over the tracks of the county-owned Miami Municipal Railroad[3] which connects with the Seaboard tracks at N. W. 6th Avenue and 11th Terrace and to the East Coast tracks at N. W. 1st Avenue and 11th Terrace. The main tracks of the East Coast run north-south on N. W. 1st Avenue between 13th Street and the Miami River,

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[3] For the historical background of rail service to the port, see *Miami Municipal R. Extension, supra*, and *Florida East Coast Ry. Co. Operation, supra.*

about a mile to the south. Between N. E. 6th and 7th Streets there is a wye turn from the East Coast's main line to tracks running east-west for four blocks crossing Biscayne Boulevard, with spur tracks to the P&O docks.

In the early 1950's, the city began planning a new port which is being constructed now at a cost of $20 million at Dodge Island, approximately four or five city blocks south of the present port site. Upon completion, all activities of the department will be transferred to Dodge Island, and the present port will be converted to other uses. In the planning and designing of the new facilities, it has always been intended that both the Seaboard and East Coast would have direct access to the larger port and that each carrier would be in a position to serve the port with its own equipment. In June 1962, the port director officially requested the East Coast and Seaboard to make an arrangement between them whereby both carriers would jointly serve the new port. Since the Seaboard did not physically connect with the new port, the East Coast suggested a plan under which it would handle cars for the Seaboard under a switching arrangement. This proposal was rejected by both the port management and by the Seaboard. Thereafter, the Seaboard presented a formal operating plan which would necessitate the use of a portion of East Coast tracks by the Seaboard, The East Coast objected to the plan for joint service and, in lieu thereof, proposed an arrangement under which it would move Seaboard cars at a stated charge from the interchange tracks at N. W. 11th Street to the new port with East Coast engines in coordinated movements.

Under its proposal, the East Coast would construct a track from the present P&O dock spur to the East Coast right-of-way line at its own expense, and the department would build the adjacent track to the port on its own property. The East Coast would be the sole rail carrier with physical connections to the new port, and all Seaboard

traffic to and from the port would be handled by the East Coast. The latter would move cars between the Seaboard's interchange track at 11th Street and the port at the same time it handled its own port traffic. Inbound freight on East Coast trains, preclassified at Jacksonville, Fla., would arrive in Miami at 10:30 or 11 p.m., and Seaboard traffic destined to Dodge Island placed on interchange tracks would be picked up by an East Coast engine and delivered to the new port around 1 a.m.

Under its plan the Seaboard would construct, own, and maintain a 585-foot connecting track in the vicinity of N. W. 11th Street and N. W. 1st Avenue from the Municipal Railroad to the East Coast main track. To allow for the southerly switch under this plan, the East Coast would have to reduce the length of two yard tracks by approximately 110 feet each. The Seaboard then proposes to operate a total distance of 0.609 mile over the East Coast's southbound main line from N. W. 11th Street, through the crossover located at N. W. 9th Street, thence over the northbound main line and north leg and stem of the wye track between 6th and 7th Streets to the east line of Biscayne Boulevard. From that terminus, it is proposed that the Seaboard and East Coast, at joint equal expense, will construct a 1,250-foot connecting track to the westerly abutment of the drawbridge in Biscayne Bay leading into the new port at Dodge Island. The new port is connected with the mainland by a causeway and twin bridges (a railroad bridge and highway vehicular bridge) owned by the department.

For the right to operate over the East Coast tracks, the Seaboard proposes to pay annual rental equal to 2½ percent of the present valuation of the jointly used trackage, subject to adjustment. Additionally, the Seaboard would pay the East Coast a portion of the total cost of maintenance, taxes, and insurance on a user basis. The proposed agreement also contains the usual provisions

found in trackage right agreements in respect to responsibility and liability of the parties, arbitration, and continuance of the agreement during the time that the department's rail facilities are operated. The agreement would be subject to termination at any time by mutual consent of the parties. The Seaboard proposes to operate engines to and from Dodge Island twice a day—spotting cars for unloading prior to 7 a.m. and removing loaded or empty cars prior to 4 p.m. or after 7 p.m. Additional switches would be performed to accommodate shippers and boat schedules.

Hearing examiner's findings.—The hearing examiner, recommending that the application be approved, found *inter alia* that long experience with respect to joint service at the port demonstrates the public interest inherent in the Seaboard's proposal; that the proposed plan of operations would not cause delay to the East Coast's own movements or adversely affect the latter carrier's shippers along the route; that service at the port by both carriers was generally favored by shippers; that the proposed joint use would not aggravate traffic congestion, nor raise any new traffic hazard, but would obviate delays and assure uninterrupted rail service essential to port operations. With respect to considerations of the public interest under the East Coast proposal, the examiner concluded that the handling of Seaboard traffic by the East Coast involving interchange would result in undue delay, primarily from use of an additional carrier; that without changes in existing tariffs the Seaboard could not lawfully absorb any part of the East Coast's switching charges; that, as a matter of practical economics, the multiple-carrier movement under the East Coast plan to serve Dodge Island exclusively would entail increased transportation and terminal charges.

The East Coast takes exception to virtually all the findings and conclusions of the examiner, and urges that the

application be denied principally because the evidence of record does not support the findings necessary under section 3(5); and that the Seaboard did not establish that the East Coast plan is unresponsive to the public's need for service. The East Coast contends that the existence of joint service at the old port is not sufficient to establish that the Seaboard's proposed use of its tracks is in the public interest; that the Seaboard plan would tend to create hazards to the safety of trains and their crews and would result in delays and congestion of East Coast cars and equipment; that the East Coast plan contemplates movement of Seaboard cars to and from the new port under a Seaboard bill of lading in through movement, not involving an "interchange of traffic," or increased freight rates to shippers and receivers; and that the charge assessed would not be reflected in tariffs or absorbed by the public.

It is argued that service to the port under the Seaboard plan would be impracticable, primarily because of inadequate operational facilities. For example, it is stated that there are no passing tracks at the port and that it has been established that there is no room for two crews and two engines for spotting or removing cars at the docks or other harbor facilities. The additional time the Seaboard would occupy the East Coast's main-line tracks, in the opinion of the latter, constitutes a basic impairment to the East Coast's ability to handle its own business, since on each of the Seaboard's proposed two movements, the tracks allegedly would have to be cleared of East Coast traffic. The East Coast stresses that its volume of traffic over tracks between 1st Avenue and Biscayne Boulevard, providing service to 14 industries, would be adversely affected by the Seaboard's use.

The Seaboard states that service to the new port will not differ from that presently rendered except that it will not serve shippers intermediate to the new facility. It

assertedly seeks only to continue a longtime service. Existing traffic relationships are not affected. This prior service, the Seaboard contends, demonstrates that the proposed joint use of East Coast tracks is in the public interest, citing *Chicago & N. W. Ry. Co.* v. *Ann Arbor R. Co.*, 263 I.C.C. 287, 296, and that since port operations require prompt loading and unloading of ships to keep their holding time in port to a minimum, it is imperative to have cars spotted at the port promptly. This service, the Seaboard contends, cannot be provided if terminal interchange of port cars is required. Moreover, the Seaboard states that the argument that its movement over the East Coast track (a straight through movement without service to intermediate points) would entail delay of East Coast traffic for from 1½ to 5 hours has no support in the record. The crossover movement, it argues, would vary depending upon the number of cars but would require from 8 to 20 minutes. The Seaboard denies that East Coast tracks must be clear of traffic during use by the Seaboard or that Dodge Island will take only one engine, stressing that the new port was designed for service by both carriers.

Discussion and conclusions.—The application under consideration constitutes a portion of an overall plan to afford continued joint service to the new port identical to that now provided by the Seaboard and East Coast to the existing port. However, no application is pending for consideration of other essential track construction projects, nor is our approval of the application here to be construed as authorizing such construction.[4] Obviously, long-continued prior service demonstrates a public need for maintaining operations by both carriers to the new port. The East Coast track involved would be used by the Seaboard only

[4] Likewise, nothing herein is to be construed as passing upon any abandonment of operations or the acquisition of additional operating rights by either the Seaboard or the East Coast that might hereafter be necessary to effectuate the overall proposal.

for direct movements to the port, and the track would be occupied from 8 to 20 minutes—which time, in our opinion, does not appear to be unreasonable or burdensome. Nor would the proposed use of the East Coast's track substantially interfere with this carrier's traffic in downtown Miami since an average of only 1.8 cars per day move over the line. The streets to be crossed by the respective carriers are the same under either plan. The municipal and shipper support, as well as the lack of public opposition, indicates that continuation of service provided by both carriers since 1931 would be in the public interest. In the judgment of the department's director and others, the interchange arrangement proposed by the East Coast would not provide adequate service because of delays, increase in switching costs, and congestion of vehicular traffic in the interchange area. In the event that the Seaboard should be denied use of the desired track, it would appear that either the Seaboard or the department will be required to construct another track to the port in order to meet the expected demand for the service of the Seaboard. Such duplication of facilities in the circumstances now present would be patently wasteful and impracticable, and only add to the congestion of downtown traffic in the city.

In view of the circumstances and alternatives presented, we believe that the Seaboard can operate more efficiently by physically serving the new port when compared to the interchange operation proposed by the East Coast. Further, we are of the opinion, and the record supports the conclusion that the use of a portion of East Coast track from N. W. 11th Street to Biscayne Boulevard, as described herein, would not substantially impair the ability of the East Coast to handle its own business, but that such use will be in the public interest. In determining what is "in the public interest" we have considered, as required, the interests of the residents of the city of Miami, the interests of the shippers using the service involved, the in-

terests of the carriers, and the interests of the public in general. See *City of Hialeah, Fla.*, v. *Florida East Coast Ry. Co., supra.* Moreover, we do not believe that it would be impracticable for both the Seaboard and East Coast to conduct operations at the Dodge Island port which was designed for operations by both of these railroads, particularly since both carriers have operated at the present smaller and more crowded port for 34 years.

We find that the use by the Seaboard Air Line Railroad Company of the railroad tracks and facilities of the Florida East Coast Railway Company in Miami, Dade County, Fla., in operating to and from the new port under construction, as described herein, is reasonably required in the public interest; and such operation is practicable and will not substantially impair the ability of the Florida East Coast Railway Company to handle its own business.

The language of section 3(5) clearly contemplates that after the right of a petitioner to use the terminal facilities of another carrier has been determined, the interested carriers shall have an opportunity to agree upon the terms and compensation for such use. A conscientious endeavor on the part of each should be undertaken to work out an agreement mutually satisfactory as to terms and compensation. In such endeavors the parties should keep in mind that if the Commission is called upon to fix the compensation it must, under section 3(5), be ascertained on the principles controlling compensation in condemnation proceedings. Those principles are discussed in length in *Missouri-K.-T. R. Co.* v. *Kansas City Term. Ry. Co.*, 198 I.C.C. 4, in which decision compensation for the use of the facilities there considered was determined upon those principles. A careful study of those principles should enable the Seaboard and East Coast to arrive at reasonable and just compensation for the use of the tracks and facilities herein required. If, however, they are unable to agree, they may petition the Commission to reopen the proceeding for fur-

ther hearing looking to a determination and prescription of terms and compensation. Jurisdiction will be retained for such purpose. See *Use by Erie of Niagara Junction Ry. Co. Terminals, supra.*

Exceptions and requested findings not specifically discussed herein have been given consideration and found to be without merit, or without material significance. Provision for the protection of employees will be considered when the terms for the operation here found to be required are established.

An appropriate order will be entered.

APPENDIX C

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 17th day of March, A. D. 1965.

FINANCE DOCKET No. 22479

SEABOARD AIR LINE RAILROAD COMPANY—USE OF TERMINAL FACILITIES OF FLORIDA EAST COAST RAILWAY COMPANY

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and the said Division on the date hereof, having made and filed a report containing its findings of facts and conclusions thereon, which report, and the report of the hearing examiner, are hereby referred to and made a part hereof:

It is ordered, That the request of Florida East Coast Railway Company for oral argument be, and it is hereby, denied.

It is further ordered, That the Florida East Coast Railway Company be, and it is hereby, notified and required to permit the Seaboard Air Line Railroad Company to use that portion of its tracks and terminal facilities, as described in the report, to serve the new port under construction at Dodge Island, Dade County, Fla., subject to the conditions stated therein.

It is further ordered, That the aforesaid use of a portion of Florida East Coast Railway tracks shall be upon such terms and for such compensation as the said carriers may agree upon, and thereafter be found just and reasonable by this Commission, or, if they shall be unable to agree within a period of 30 days from the effective date hereof, then upon such terms and for such compensation as the Commission, pursuant to a further hearing upon request of either the Florida East Coast Railway Company or the Seaboard Air Line Railroad Company, hereafter may

fix as just and reasonable, as ascertained in accordance with section 3(5) of the Interstate Commerce Act.

It is further ordered, That the enjoyment of the use of said tracks and terminal facilities shall be subject to the right of the Florida East Coast Railway to require that the compensation paid for the said use shall be adequately secured to it before the said use shall be commenced; and

It is further ordered, That this order shall become effective 35 days from the date of service hereof and shall continue in force and effect until the further order of the Commission.

By the Commission, Division 3.

BERTHA F. ARMES,
Acting Secretary

(SEAL)

APPENDIX D

INTERSTATE COMMERCE COMMISSION

Served July 31, 1964

Notice to the Parties

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of such exceptions. At the expiration of said period for the filing of exceptions, the recommended order will become the order of the Commission and will become effective unless exceptions have been seasonably filed or the order has been stayed or postponed by the Commission. If exceptions are filed, replies to exceptions may be filed within 20 days after the final date for filing of exceptions. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice or order to that effect has been served.

Finance Docket No. 22479

SEABOARD AIR LINE RAILROAD COMPANY—USE OF TERMINAL FACILITIES OF FLORIDA EAST COAST RAILWAY COMPANY

Decided .....

Order entered authorizing operations by the Seaboard Air Line Railroad Company over certain tracks and terminal facilities of the Florida East Coast Railway Company in Miami, Dade County, Fla. Conditions prescribed, and jurisdiction retained for specific purpose.

Richard A. Hollander for applicant.

A. Alvis Layne for intervener in opposition.

Roland A. Smith for intervener in support of applicant.

J. W. Hayes, T. C. Bolin, J. R. Bailey, Ben E. LeFeat, Cecil Johnson, W. T. Kitt, Dale McLaine, John S. Fetters, Benjamin P. Weinstock, L. W. Hughes, E. [illegible]. Glenn and *Hugh O. VanArsdall, Sr.*, for railway labor organizations.

Report and Order

RECOMMENDED BY PAUL C. ALBUS, HEARING EXAMINER

By application filed February 25, 1963, the Seaboard Air Line Railroad Company (Seaboard)[1] seeks an order under Section 3(5) of the Interstate Commerce Act, hereinafter sometimes referred to as the act, which would permit it to operate over some 3220 feet of track owned by the Florida East Coast Railway Company (East Coast)[1] at Miami, Dade County, Fla. The applicant also requests the Commission to fix just and reasonable terms and compensation for the use of such track which is necessary in order for the Seaboard to serve the new port facilities now under construction at Dodge Island in Miami. East Coast opposes the application, and the Greater Miami Traffic Association intervened in support of the Seaboard.

Hearings were held at Miami on September 30, 1963, and on April 8-9, 1964. Briefs were filed. Unless otherwise indicated, all points hereinafter mentioned are in Florida.

In its protest, East Coast opposes the application upon the grounds, among others, that the Commission has no authority under section 3(5) of the act to grant the rights sought by Seaboard; that the public interest does not require Seaboard to operate its trains over the tracks

[1] A carrier by railroad subject to part I of the act.

of East Coast; that the public generally will be seriously disadvantaged by the proposed operation of Seaboard over and across public highways at grade, including the heavily traveled 6-lane Biscayne Boulevard; and that the proposed operations are not practicable and will substantially impair the ability of the East Coast to handle its own business. The jurisdictional question was not mentioned at the hearings, or further stressed on brief.

The present port of Miami, which is owned and operated by Metropolitan Dade County, is located between N.E. 9th Street and N.E. 12th Street, east of Biscayne Boulevard. It consists of an area of approximately 26 acres of land, 3 slips, berthing space for 10 large ships, 305,000 square feet of transit sheds, 10,000 square feet of refrigerated space, 35,000 square feet of office space, 47,000 square feet of passenger terminals, 700 lineal feet of dock side railway tracks, 5,800 lineal feet of railway tracks alongside transit sheds, and parking space for about 200 vehicles. The port presently owns and maintains approximately 6 miles of railroad tracks which connect with the Seaboard tracks at N.W. 6th Avenue and 11th Terrace, and with the East Coast tracks at N.W. 1st Avenue and 11th Terrace, and with the East Coast tracks at N.W. 1st Avenue and 11th Terrace.

The port was originally constructed by the city of Miami which also built the Miami Municipal Railroad (Municipal Railroad) to reach the dock area. When the line of the Seaboard was extended to Miami in 1928, the municipal authorities approached the Seaboard in connection with having that railroad connect with the Municipal Railroad and serve the port direct. The extension of the Miami Municipal Railroad was placed in operation January 17, 1931, and both the Seaboard and the East Coast have served the port since that time. See *Miami Municipal Railroad Extension,* 158 I.C.C. 169, 170 I.C.C. 175; and *Florida East Coast Ry. Co. Operation,* 170 I.C.C. 171. The

historical background of rail service to the port is contained in the cited cases and need not be restated.

In the early 1950's the city of Miami began planning a new port. As a part of that planning in 1960 the port facilities and the Municipal Railroad were transferred from city auspices to Metropolitan Dade County, and the county has operated the port properties since that time under the Dade County Seaport Department, hereinafter referred to as the Seaport Department.

The new port will be located on a man-made island, known as Dodge Island, approximately four or five city blocks south of the present port site. It will be connected with the mainland by a causeway and twin bridges, one for use as a railroad bridge and the other for highway vehicular traffic. The new port has an area of 300 acres with 9,300 lineal feet of bulkheading capable of berthing 20 ships and aprons of from 70 to 100 feet in width. It will have 100,000 square feet of office space; 600,000 square feet of transit shed space; a passenger terminal; 100,000 cubic feet of refrigerated space; 18,500 lineal feet of railroad tracks of which 3,500 lineal feet will be dockside, and 5,000 lineal feet of make-up tracks; 100 acres for open storage; and 45 acres for trailer ship operations.

The first phase of the development of the new port is estimated to cost approximately $20 million of which approximately $10 million of construction has been completed and another $2.5 million of construction is now in progress. It is expected that the new port will be ready for partial operation by the end of the current year or early in 1965. Upon completion, all activities of the Seaport Department are to be transferred to the Dodge Island port, and the present port site is to be converted to other uses.

At all times during the planning and designing of the new port facilities it was contemplated that both railroads operating into Miami would have direct access to

the new port so that each carrier would be in a position to serve the port with its own equipment. On June 21, 1962, the director of the port wrote the Seaboard and East Coast and officially requested that the two railroads make an arrangement between them to permit both railroads to continue to jointly serve the new port as they had in the past. The Seaboard indicated a willingness to work out such arrangements. East Coast advised, however, that since the Seaboard did not physically connect with the new port, East Coast would handle cars for the Seaboard under a switching arrangement. Since such a switching arrangement was satisfactory to neither the port management nor the Seaboard, a meeting of all interested parties was held on September 26, 1962. At that meeting Seaboard presented a formal operating proposal calling for the use of certain of the East Coast tracks by the Seaboard to permit the continuance of joint service at the new port. East Coast indicated its objection to the Seaboard's proposal, and in substitution thereof proposed switching arrangements which contemplated interchanging traffic on the interchange tracks connecting with the Municipal Railroad near N.W. 11th Street. No agreement was reached and although East Coast advised it would make a counter proposal to Seaboard and to the port authorities setting out the details as to how Seaboard's traffic would be handled to the port, no such proposal was offered. In the absence of such agreement, the Seaboard filed the instant application.

Section 3(5) of the Act provides:

> (5) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a

reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

Under its proposal Seaboard would construct, own and maintain a 585-foot connecting track between the track of the Seaport Department (Municipal Railroad) and the East Coast main line in the vicinity of 11th Street. In effecting such construction, East Coast would have to reduce the length of two yard tracks by approximately 110 feet each in order to allow for the location of the southerly switch of the proposed connection. Although East Coast would make this relocation, it would be at the sole cost of Seaboard. On the eastern end of the proposed operation Seaboard and East Coast, at joint and equal expense, would construct a 1,250-foot connecting track between the eastern boundary of Biscayne Boulevard and

the Seaport Department's new track at the westerly abutment of the drawbridge in Biscayne Bay leading into the new port at Dodge Island. The estimated cost of the connecting track at 11th Street is $80,900; the estimated cost of the relocation of the switches on the East Coast is $4,720, and the estimated cost of the joint track to connect with the drawbridge is $15,000. No application is pending for approval of the proposed constructions.

Thus Seaboard proposes to operate a total distance of 0.609 mile over the East Coast's southbound main line, through the crossover located at N.W. 9th Street, thence over the northbound main line and north leg and stem of a wye track between N.E. 6th and 7th Streets to the east line of Biscayne Boulevard. For the right to operate its trains and engines over the tracks of East Coast, Seaboard proposes to pay annually as rent a sum equal to 2½ percent of the present valuation of the jointly used trackage. If, during the continuance of the joint use, additions, betterments or improvements are made by East Coast to the jointly used trackage, the investment cost of such improvements would be added to the valuation and Seaboard's 2½ percent annual rental would be adjusted accordingly. The expense cost of such improvements would be divided between the parties on the user basis set out below and prorated annually. Valuation of the jointly used trackage is to be determined by the original inventory of the Commission, plus subsequent additions, betterments and retirements.

East Coast is to maintain the jointly used trackage in good operating condition and the Seaboard, in addition to the annual rental based on the actual valuation of the tracks, would pay to East Coast a portion of the total cost of maintenance, taxes and insurance to be apportioned between the parties on the percentage that the total number of engines and cars (loaded or empty) bears to the total number of all engines and cars (loaded or empty) handled

over the jointly used tracks; one diesel locomotive unit to be counted as one car. Taxes and insurance would be prorated annually and maintenance expenses monthly except that maintenance expense in connection with betterments would be prorated annually. The proportion of the maintenance cost would include the applicable percentage charges for payroll taxes, health and welfare benefits, and vacation and holiday time pay.

In addition, the agreement would contain the usual provisions found in similar trackage right agreements between railroads in respect to: (a) maintenance of equipment used in accordance with standards set by industry, Federal and State regulatory bodies; (b) the responsibility and liability of the parties; (c) arbitration of differences of opinion and disputes; and (d) a statement that the agreement would continue during the time that the Seaport Department's rail facilities are operated, except that the agreement may be terminated at any time by mutual consent of the East Coast and Seaboard. No attempt was made by East Coast to challenge the terms and compensation proposed by Seaboard. Its affirmative evidence at the hearings was designed primarily and almost exclusively to the major proposition that public interest does not require direct service by Seaboard to the new port.

Seaboard intends to operate engines to and from Dodge Island twice a day. The first engine would place cars for unloading prior to 7:00 a.m., and remove any loaded or empty cars available for movement from the port. The second engine would operate prior to 4:00 p.m. or after 7:00 p.m. Additional switches would be performed to accommodate shippers and boat schedules. This proposed service to Dodge Island would connect with Seaboard's scheduled freight trains to and from Miami. Seaboard has trains scheduled into Miami at 10:00 p.m., between 3:00 and 4:00 a.m., 10:30 a.m., and one at 8:00 or 9:00 p.m.

It has northbound freight trains leaving at 10:00 p.m., between 12:30 and 2:00 a.m., and a clean-up leaving at 8:00 a.m.

East Coast proposes to build a track from the present P&O dock spur to the East Coast right-of-way line at its own expense. The Seaport Department would build the track on its own property. Under this proposal East Coast would be the sole rail carrier with physical connections to serve the new port, and all Seaboard traffic to and from the port would have to be handled in interchange. As the East Coast train comes from the north it would take this traffic from the interchange track to the port at the same time it handled its own port traffic.

East Coast's inbound freight, preclassified at Jacksonville, arrives in Miami at 10:30 or 11:00 p.m. A yard engine then takes this traffic into the downtown area for placement, arriving there around 1:00 a.m. This engine would also deliver incoming traffic to Dodge Island, passing the interchange track enroute. East Coast states that if Seaboard could place its traffic on the interchange by the time the East Coast engine reaches the interchange, East Coast would then pick up Seaboard's traffic and all of the cars would be placed at the port at the same time.

On outbound freight East Coast would switch the port in the early evening and in the morning. If any Seaboard cars, loaded or empty, were made available at either time, East Coast would pick up the Seaboard cars and place them on the interchange track in time to make the Seaboard connections. On special or emergency switches for a particular car, East Coast would make the switch as required by the customer whether it came in on the Seaboard or East Coast. The latter has engines working in the vicinity of the interchange and they can be dispatched to make pickups of special movements without undue delay.

East Coast is prepared initially to charge Seaboard $22.85 per car for switching Seaboard traffic to and from the new port. This charge is equivalent to the amount Seaboard charges East Coast to move East Coast cars to and from points at this Miami International Airport Depot industrial area reached only by Seaboard tracks. East Coast is prepared, however, to revise the charge for moving Seaboard cars to and from Dodge Island when sufficient operating experience has been gained to provide adequate cost data. East Coast states that the charge, as finally determined, would be evidenced by a private contract between it and Seaboard, and would not be contained in tariffs filed with this Commission; the present tariffs would only be amended to change the name of the port property from "Municipal Docks" to properly identify the new port on Dodge Island.

East Coast contends its proposal is in the public interest; that it is essential to the safe and efficient operation of its own facilities, as well as those on Dodge Island; and that it is the only practicable and efficient means by which East Coast and Seaboard can serve the new port. It further states that the Seaboard proposal is vague in detail as to control and supervision of train operations; that the Seaboard plan would create unnecessary traffic and safety hazards, damage lading compound confusion and congestion, and cause inefficient operations and increased costs at the new port; and would substantially impair East Coast's ability to handle its own business.

In this connection, East Coast argues that Seaboard's plan would cause delay to East Coast's own movements, and further, that it would not be practicable for two railroads to work the new port. It also says that because of the need to flag street crossings the Seaboard's proposal would create a hazard to employees; and it urges that service to East Coast customers located on its track between

1st Avenue and Biscayne Boulevard would be adversely affected by Seaboard's operation. Past experience in joint service to the existing port refutes each of these contentions.

The procedure in switching at the new port will differ in no way from the present operation. Both railroads now switch the port and none of the port user witnesses made any mention of damage when asked if they had experienced difficulties at the present port. There would be no greater damage to lading under the Seaboard proposal than now exists.

East Coast insists that its plan will not result in any increase in charges paid by the public on traffic moving through the new port. While this may be true with respect to East Coast traffic, the record shows that existing Seaboard tariffs in many instances would prevent Seaboard from lawfully absorbing the switching charge which East Coast proposes. For example, without any change in the existing tariffs, on water-borne traffic which might move through Dodge Island on domestic rates to and from non-competitive Seaboard local stations, the Seaboard could not lawfully absorb any part of the East Coast's switching charge, regardless of what it might be. Furthermore, as a matter of practical economics, under the East Coast plan a movement which is single line in nature today would become a multiple carrier situation at the new port, and an interchange arrangement, with the attendant increased cost and expense, would be involved. If Dodge Island is to be served exclusively by East Coast, the total transportation and terminal charges on Seaboard movements will be increased over those now prevailing at the port of Miami. Analysis of the tariff provisions cited on brief by counsel for the Greater Miami Traffic Association supports this conclusion, not only on non-competitive line-haul domestic traffic moving through the port, but

with respect to export traffic and cross-town switch movements as well.

East Coast directly serves 7 industries along its main line between N.W. 8th Street and the Miami River; 8 industries between N.W. 1st Avenue and Biscayne Boulevard along the P&O dock spur; and 6 industries on the P&O dock. On the municipal dock lead track between N.W. 1st Avenue and Biscayne Boulevard it serves 12 industries, and 14 industries on the municipal docks. During the years 1961-62, East Coast handled 4206 and 4028 carloads of freight, respectively, or an average of slightly over 11 cars a day, to and from these industries. Several of the industries have discontinued rail service within the past year. In addition East Coast maintains team tracks at various locations on each side of its mainline from N.W. 11th Street south to its freight station near the river.

East Coast contends that the Seaboard proposal would create unnecessary traffic and safety hazards. It points out that trains serving the new port facilities must cross, at grade, some of the most heavily traveled streets in downtown Miami, namely, Biscayne Boulevard, North Miami Avenue, N.E. 1st Street, N.E. 2nd Street and N.W. 1st Avenue which, in order, had traffic counts on October 25, 1962, of approximately 55,000, 10,000, 12,000, 13,000, and 5,500 vehicles in a 24-hour period. All train movements over these streets must stop at each intersection, and a trainman must flag every crossing. The city has requested that train movements across Biscayne Boulevard be made only during periods of minimum vehicular traffic flow, that is, between 7:00 p.m. and 6:00 a.m. East Coast states that under the Seaboard proposal, two train crews would be engaged in opposing movements in a congested area and across busy vehicular crossings, and that such a situation would create obvious safety hazards to the crews and to the public.

At the present time there are two railroad tracks across Biscayne Boulevard and the other north-south vehicular highways mentioned by East Coast between its main line and the municipal piers. In serving the present piers, it is frequently necessary to switch back and forth across Biscayne Boulevard to spot cars at shipside. Such hazardous operation would be eliminated because all crossings of that highway will be on a single track in a direct movement over the causeway to the new port. In addition, municipal authorities contemplate opening the east-west streets to vehicular traffic in the vicinity of East Coast's old passenger station which, no longer required for railroad purposes, has been dismantled. Most of East Coast's tracks laid along 1st Avenue between its interchange track with the Seaboard at 11th Street south to Flagler Street also are to be eliminated. When these changes are made, the movement of vehicular traffic in the affected area should become more fluid, and the congestion complained of by East Coast in large measure should be relieved. The contention with respect to the congestion in the Miami downtown area appears to be overemphasized by East Coast in view of the fact that the city officials support Seaboard's plan to serve the new port, something they would not do if vehicular traffic would be endangered or substantially inconvenienced.

All the testimony adduced at the hearings, except that submitted by officials of East Coast, favored dual rail service to the new port. The director of the port, who had a major role in the planning and development of the new facilities, testified that direct rail competition would mean better service to the port users, as well as to the Dade County area generally; that the impetus of such competition would insure prompt handling of switching, and requests for cars; and that promptness is particularly vital at the port because the ships are generally on a very tight schedule and must hold time in port to a minimum. He further stated that in the event of a national emergency,

service by each carriers handling its own equipment would avoid delays and additional switching; and that after the many years of dual service, to now permit operation by East Coast alone would effectively downgrade the rail service available at the port.

The witness expressed grave concern over cessation of activity in the event of labor difficulties if only one railroad served the port. On January 23, 1963, a strike by employees was called on the property of East Coast, and Seaboard handled all the rail traffic through the port of Miami until September of that year when East Coast resumed freight service at the port. The strike was still going on at the time of the hearings herein. If the port had been served exclusively by East Coast, it would have been closed to rail traffic for a considerable portion of 1963. The director and the users of the port seek to avoid any such disruption in connection with rail service to the new facilities on Dodge Island. Shippers and receivers of freight through the port supported the testimony of the port director, and requested that both railroads be permitted to serve the new port with its own engines and crews. They particularly object to the delay which would result from the use of an additional carrier involved in an interchange movement.

The municipal and shipper support in this proceeding, as well as the lack of public opposition, indicates clearly that the public interest would best be served by the continuation of an operation rendered for many years to a port that is expected to increase in size and to require added service for the future. It has been held that the term "public interest" as used in the statute is not a mere general reference to public welfare, but as shown by the context and purpose of the act, has direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. *Texas* v.

United States, 292 U.S. 522. In determining whether a proposed transaction is in the public interest, consideration must be given to the public affected and to the effect of the transaction on adequate transportation service to all parts of the public which would be affected. *Detroit, T. & I. R. Co., Control,* 275 I.C.C. 455, 488; *Chicago, B. & Q. R. Co., Control,* 271 I.C.C. 63. The Commission has always recognized that the interests of shippers and users of transportation are matters of substantial importance in determining the question of public interest and need. *St. Marys R. Co., Construction,* 295 I.C.C. 677. Not only does the shipper testimony in this proceeding show that continued service by both railroads would be in the public interest, but the director of the port has demonstrated that it is important that the port be kept open and in as vigorous condition as possible so that water carriers may be attracted to it and the public given the least expensive and most efficient service. Compare *Construction by W., B., T. & S. Ry.,* 124 I.C.C. 769, 802.

For many years the Seaboard has crossed the main-line of East Coast at 11th Street, physically occupying the tracks of the latter for a period of time in connection with each movement. Under the suggested method of operation, the East Coast tracks would be occupied for two movements daily, each movement requiring from 10 to 20 minutes. By comparison, today's operation, and that which has been going on for some time, requires at least half that amount of time in occupying the crossing for each of the two daily movements. The amount of additional time which would be involved under Seaboard's proposal cannot be said to be unreasonable or burdensome. Nor is it logical for East Coast to urge that its use of the tracks between 1st Avenue and Biscayne Boulevard would be impaired as a result of the suggested operations. For many years both of the railroads have served the 11 industries now located on the Municipal Railroad tracks east of the East Coast main-line and west of Biscayne Boulevard;

whereas under the applicant's proposal the Seaboard would operate straight through and would not serve any of the 8 industries located on the East Coast track which would be used to reach the new port. Equally unreasonable is the East Coast argument that it is impracticable for the two railroads to work the new port. Aside from the fact that both have operated jointly at the existing, smaller port in a satisfactory manner for 35 years, the new and larger port facility has been especially designed for service by both railroads. The same number of cars still will be moved to and from the port over a similar route under either plan, and any hazard which is present will continue to exist.

The record supports a finding that the joint use proposed by the Seaboard would not materially change the method of operation which has long been followed, and would not substantially impair the East Coast's ability to handle its own business. Compare *Chicago & N.W. Ry. Co.* v. *Ann-Arbor R. Co.*, 263 I.C.C. 287. The long past experience with respect to joint service at the port of Miami demonstrates the public interest with respect to applicant's proposal. A continuation of the existing joint service obviously would be more efficient and economical than the new interchange service proposed by East Coast. Furthermore, continuation of the present method of servicing the port would assure its future operation without discrimination or favoritism, insuring better and more dependable service, and promoting proper development of the port. Joint service would obviate delays, which cannot be tolerated in port operations, and would assure the port of Miami an uninterrupted rail service. Past experience has demonstrated that the joint use of a portion of the East Coast's terminal tracks would not substantially impair the ability of that carrier to handle its own business. In the past the Commission has exercised its power to require joint use of tracks where the operation sought would be in the public interest and would be prac-

ticable without substantially impairing the ability of the owning line to handle its own business. *Use by Erie of Niagara Junction Ry. Co.*, 269 I.C.C. 493. The same conclusion is warranted in this proceeding. The spur of competition will insure efficient and adequate service to the new port.

The position advocated by East Coast in this proceeding is similar to that taken by it in *Miami Municipal Railroad Extension, supra,* wherein the Commission, over the objection of East Coast, permitted operations by Seaboard to the municipal docks. The fact that the new port will be publicly owned and operated, all carriers serving Miami should have direct access to its terminal facilities. Compare *Illinois Central R. Co. Construction and Trackage,* 307 I.C.C. 493, and the cases therein cited. Extension of the Seaport Department's existing tracks to connect with the new port is not practicable, and for the Seaboard to construct its own line to Dodge Island would constitute a wasteful and unnecessary duplication of railroad facilities, particularly when the same result can be obtained by the expediency of a comparatively short operation over the tracks of East Coast. If there is any justification for the enactment of section 3(5) of the act, it is to cover a situation as here presented.

Representatives of railway labor testified at the final hearing in this proceeding. A witness with seniority on East Coast, but who has not worked on that railroad since June 1962, opposed the application; and a former East Coast employee now working for Seaboard supported the application. The latter also requested protective conditions for the benefit of any employee who may be adversely affected in the event the instant application is denied. It is questionable whether the Commission can impose such conditions in a proceeding instituted under section 3(5) of the act. Regardless of this fact, however, if the recommendation of the examiner herein is adopted,

each carrier will continue to handle its own traffic with its own crews to and from the port, in which case employees in no manner whatsoever will be adversely affected.

Ultimate Findings and Order

The hearing examiner finds that the use by the Seaboard Air Line Railroad Company of the railroad tracks and facilities of the Florida East Coast Railway Company in Miami, Dade County, Florida, in operating to and from the new port under construction, as described herein, would be in the public interest; and that such operation is practicable and would not substantially impair the ability of the Florida East Coast Railway Company to handle its own business. Accordingly, an appropriate order should be entered, conditioned upon such terms and such compensation as the Seaboard Air Line Railroad Company and the Florida East Coast Railway Company may agree upon, or, in the event of a failure to agree, as this Commission may fix as just and reasonable, to be ascertained in accordance with the provisions of section 3(5) of the act; and conditioned further that the enjoyment of the use of said facilities therein prescribed shall be subject to the right of the Florida East Coast Railway Company to require that the compensation for such use shall be paid or shall be adequately secured before the use under that order shall be commenced.

The language of section 3(5) clearly contemplates that after the right of a petitioner to use the terminal facilities of another carrier has been determined, the interested carriers shall have an opportunity to agree upon the terms and compensation for such use. A conscientious endeavor on the part of each should be undertaken to work out an agreement mutually satisfactory as to terms and compensation. In such endeavors the parties should keep in mind that if the Commission is called upon to fix the compensation it must, under section 3(5), be ascertained on the principle controlling compensation in condemnation proceedings.

Those principles are discussed at length in *Missouri-K.-T. R. Co.* v. *Kansas City Term. Ry. Co.*, 198 I.C.C. 4, in which decision compensation for the use of the facilities there considered was determined upon those principles. A careful study of those principles should enable the Seaboard and East Coast to arrive at reasonable and just compensation for the use of the tracks and facilities herein required. If, however, they are unable to agree, they may petition the Commission to reopen the proceeding for further hearing looking to a determination and prescription of terms and compensation. Jurisdiction should be retained for such purpose. See *Use by Erie of Niagara Junction Ry. Co. Terminals*, 269 I.C.C. 493, 503.

Premises considered, it is the ORDER of the hearing examiner that:

The application of the Seaboard Air Line Railroad Company be, and it is hereby, granted; and that the use by the said Seaboard Air Line Railroad Company of the railroad tracks and facilities of the Florida East Coast Railway Company to serve the new port under construction at Dodge Island in Miami, Dade County, Fla., described herein, be and it is hereby, approved and authorized subject to the conditions mentioned heretofore.

Within 30 days from the effective date of this order the Seaboard Air Line Railroad Company and the Florida East Coast Railway Company shall submit for consideration and approval of the Commission a joint agreement containing the terms and compensation covering the operation of the tracks and terminal facilities the use of which is herein authorized; and in the event such agreement for any reason cannot be reached, a petition may be filed requesting the Commission to determine such just and reasonable terms and compensation.

The authority herein granted shall not be exercised prior to the date of service of an order adopting this recommenda-

tion as the order of the Commission, or of a notice stating that this recommended order has become the order of the Commission.

By the Commission, Paul C. Albus, Hearing Examiner.

Dated at Washington, D. C., this 28th day of July, A. D. 1964.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX E

Interstate Commerce Act

Section 1(18), 49 U.S.C. § 1(18)

No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

Section 1(19), 49 U.S.C. § 1(19)

The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of such State in which

such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

Section 1(20), 49 U.S.C. § 1(20)

The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to or permits any violation of the provisions of this paragraph or of paragraph (18) of

this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Section 1(22), 49 U.S.C. § 1(22)

The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Section 3(5), 49 U.S.C. § 3(5)

If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation

so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

Administrative Procedure Act

Section 10(c), 5 U.S.C. § 1009(c)

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

NOV 23 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 715

FLORIDA EAST COAST RAILWAY COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

MOTION TO AFFIRM OF APPELLEE SEABOARD AIR LINE RAILROAD COMPANY

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November, 1966

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MOTION TO AFFIRM OF APPELLEE SEABOARD AIR LINE RAILROAD COMPANY

Appellee Seaboard Air Line Railroad Company, hereinafter referred to as Seaboard, pursuant to Rule 16 of the Rules of this Court, moves that the judgment of the District Court be affirmed on the ground that the question raised by the appellant is so clearly lacking in substance as not to warrant further briefing and argument.

QUESTION PRESENTED

Is an order of the Interstate Commerce Commission which granted the Seaboard authority to operate over a portion of the Miami, Fla., terminal facilities of the Florida

East Coast Railway Company, pursuant to Section 3(5) of the Interstate Commerce Act, the proper subject of judicial review?

STATEMENT

For some 37 years the Seaboard and the Florida East Coast Railway Company have both served the Port of Miami, a seaport which is now operated by the Dade County Seaport Department (Seaport Department). The purpose of the Seaboard's 1963 application to the Interstate Commerce Commission, under attack here, is to enable a continuation of the same joint service when the Miami seaport operations are moved to a new port facility being located on Dodge Island, about five blocks away from the existing docks. The latter will be abandoned.

All of the invovled railroad tracks are located in downtown Miami.

As shown on the map which is attached as an appendix, and which is a scaled down portion of Exhibit 4 in the Commission's record, the only tracks leading to the present piers are owned by the Seaport Department (under the name "Miami Municipal Railroad"), and both the Seaboard and the FEC now operate their own equipment to and from the port over those tracks. The Seaport Department's railroad tracks do not serve the new Dodge Island site, however.

Unless the Seaboard constructs new track in downtown Miami, an impracticable and unnecessary project, it will be able to reach the port only by operating over 3220 feet of the existing FEC track. The Commission's decision, upheld by the lower court, would permit the Seaboard to operate its trains over that segment of track.

The record before the Commission shows that the Seaport Department, and the County which it represents, desire a continuation of the same switching and terminal service

which has been rendered at the existing port for many years. For that reason, four years ago they requested the Seaboard and the FEC to make the necessary arrangements for performing such operations at the new facility. However, the FEC would not permit any use of its terminal tracks by the Seaboard and, when no agreement could be reached, it became necessary to file the disputed Section 3(5) application.

That application was the subject of hearings before a Hearing Examiner on September 30, 1963, and on April 8-9, 1964, at Miami. About a year later, after the Examiner had recommended approval of the application, the Commission granted the authority which was sought.

The Commission's order also provides for retention of jurisdiction by the agency so that, in the event the two railroads cannot agree as to the compensation to be paid by the Seaboard, the parties may come back to the Commission, which will then make that determination for them. This retention of jurisdiction is in conformity with Section 3(5) of the Act.

On appeal, a three-judge District Court upheld the Commission's action in a decision dated June 24, 1966.[1] The appellant is before this Court on a direct appeal from that final judgment of the District Court.

Since the FEC's appeal does not question the Commission's conclusions that the Seaboard proposal would be practicable, would not do harm to FEC operations, and would be in the public interest, this appellee will rely upon the lower court's affirmance of those findings and proceed directly to the only issue brought here. In essence, the FEC focuses its appeal on the proposed 585-foot connection

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[1] The opinion of the three-judge District Court in this case is found at *Florida East Coast Railway Co. v. United States*, 256 F. Supp. 986 (1966).

shown in red on the map attached to this motion; saying that the Commission's order is not ripe for judicial review because the Seaboard did not seek and obtain authority to build that connection.

ARGUMENT

It is noteworthy, we think, that the only party appealing the Commission's decision is the party which bases its plea entirely on the premise that the Commission's decision is not appealable.

The FEC raised that same issue before the court below:

> "East Coast argues, therefore, that the Commission's order is not final and hence not now reviewable."[2]

The three-judge court met that argument head on, and, quite properly, reached this conclusion:

> "We cannot agree. 'The true test [of ripeness] is the substantiality of present or imminent harm which the administrative action inflicts on the plaintiff.' 3 Davis, Administrative Law § 21.07, at 176-77 (1958). See Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 424-425, 62 S. Ct. 1194, 86 L.Ed. 1563 (1942). One key factor is whether the order determines legal rights. 3 Davis, supra, at 177. The present order clearly does so, ordering one carrier to allow another carrier to use its track. This determination of the parties' legal rights may be the final action taken by the Commission in this dispute, as the parties may agree upon the terms of compensation. Most important, the effective date of the order does not depend on the establishment of the terms of compensation as long as the use of East Coast track is 'adequately secured * * * before the said use shall be commenced.'

[2] Id., page 988.

> See also Missouri-Kan.-Tex. R.R. v. Kansas City Terminal Ry., 198 I.C.C. 4, 5 (1933) (track used for 4 years before compensation settled)."[3]

Making further reference to the connecting track which is the subject of this appeal, the lower court then pointed out:

> "East Coast further argues that the order deprives it of property without due process of law. In order for Seaboard to move its trains on and off the East Coast tracks sought to be used, construction of a short connecting track will be desirable or possibly necessary. East Coast urges that § 1(18) of the Interstate Commerce Act requires Commission approval (using the more strict 'public convenience and necessity' standard) before the connection can be built, that no request has been made to the Commission for its approval, but that the present order conclusively binds the Commission to grant such approval in the future, thereby depriving East Coast of the right to a full and fair hearing on Seaboard's application. Seaboard contends that connection comes within the § 1(22) exemption, obviating the need of Commission action."[4]

The court then was perfectly correct in concluding:

> "We need not decide, however, whether the proposed construction comes within § 1(18) or § 1(22), for East Coast's complaint of the lack of due process is premature. Even if Commission approval is needed, we cannot presume that the Commission will disregard its obligations to give East Coast a fair hearing and to apply the stricter standard of 'public convenience and necessity.' After such a hearing, if one is needed, the Commission could, consistent with the order now under

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[3] Id., page 988.
[4] Id., page 989.

review, withhold its approval of the construction, but Seaboard would be able to serve the port by obtaining acceptance of a different type of connection or by using a preexisting, though possibly less efficient, connection. In any event, East Coast can complain about the denial of a fair hearing and the use of improper standards only after they occur. They presently have not."[5]

Appellant makes much[6] of the fact that the District Court relied, in part, upon this Court's decision in *Columbia Broadcasting System*,[7] and urges that such reliance was in error. Not so; for *Columbia Broadcasting System*, as probably will be the case here, involved a situation in which an agency ruling "attach(ed) legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control".[8] Here, as we shall point out in a moment, contrary to the FEC's contention, there will be no further action before the Commission with regard to the disputed 585-foot track connection. Indeed—and, again we will discuss this in more detail later—that connecting track need never be constructed in order for the Seaboard to operate over the terminal tracks which are the subject of the Commission's outstanding order. Here, the compensation to be paid by Seaboard to the FEC—for which Congress, in Section 3(5), made provision for subsequent Commission hearings and adjudication; and which probably will be the subject of such hearings and adjudication—is the order "that may follow" and be "controlled" by the Commission's existing

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[5] Id., page 989.

[6] FEC's Jurisdictional Statement, pages 12-13.

[7] *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942).

[8] Id., page 425.

order. The FEC should not misunderstand the lower court's use of *Columbia Broadcasting System* because, in the same paragraph citing that decision, the District Court, referring to the Commission's order, said:

> "This determination of the parties' legal rights may be the final action taken by the Commission in this dispute, as the parties may agree upon the terms of compensation."

Once again, the lower court's conclusion is quite proper.

We also would respond to the FEC's overall argument in this way. First, it is important to note that appellant urges its point because, in its opinion, a Section 1(18) application must be, and will be, filed with the Commission for authority to construct the 585-foot connecting track shown in red on the attached drawing. Thus, the FEC's Jurisdictional Statement says:

> "The Commission concedes that its determination covers only part of an overall operational plan, which can be implemented only after essential connecting tracks have been constructed by Seaboard under a certificate 'that the present or future public convenience and necessity require or will require' construction and operation of such tracks."[9]

This premise—basic to the FEC's argument—is, however, false.

The Commission has not, at any time during its handling of this case, "conceded"—or in any other way stated—that the Seaboard must obtain from it a certificate to build any

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[9] FEC's Jurisdictional Statement, page 9.

track connection related to the port proposal which was being considered.

The FEC's Jurisdictional Statement says, further, that:

> "Seaboard can not construct that connection—and consequently use East Coast's track—unless and until it obtains from the Commission, pursuant to the provisions of section 1(18) of the Act, a certificate authorizing such construction."[10]

Once again the FEC's argument fails, not only for the reasons stated by the lower court, but, additionally, because no Section 1(18) authority to construct the 585-foot connection is needed; and no such authority will be sought of the Commission. The reason why none will be requested, and why the Commission has not stated that further certification of the present plan is necessary, deserves comment, and that follows.

In considering the FEC's argument it is necessary to know that the disputed connecting track is located at 11th Street and First Avenue in Miami. Then, it must be kept in mind that there already is a connecting track at 11th Street and First Avenue. As the FEC's President said, that track:

> "* * * has been used as an interchange facility between the railroads for many years * * *."[11]

The existing connecting track is the same connection which the FEC proposed to use in interchanging port cars with

[10] Id., page 11.

Note: References to "Tr." are to the Reporter's Transcript forming a part of the record before the Commission.

[11] Tr. 218. Also, for example, see Tr. 35, 54, 145-146.

the Seaboard if a so-called FEC plan had been found satisfactory by the Commission instead of the Seaboard plan.[12] In other words, as can be seen from the attached drawing, and from the testimony, the Seaboard actually could perform its proposed service to Dodge Island without the new connecting track; but, of course, the backing of rail cars over First Avenue and over 11th Street could cause difficulties with vehicular traffic and makes the proposed new connection a more practical one.

Also, it is clear throughout the record that the Seaboard would use the FEC track, and the 585-foot connection to it, only for switching movements.

Insofar as the Federal statutes are concerned, Section 1(18) of the Interstate Commerce Act requires a carrier to obtain Commission authority before constructing an extension of a line of railroad. It is Section 1(18) upon which the FEC relies in its argument. On the other hand, the Seaboard relies upon Section 1(22) of the Interstate Commerce Act which exempts from the certificate requirement of Section 1(18) the construction of such terminal facilities as "spur, industrial, team, switching or side tracks."

There are many Commission and court decisions treating with the question of whether a particular piece of track is an "extension" or whether it is exempt under the provisions of Section 1(22). However, the leading case is the *Texas & Pacific* decision[13] where, at page 278, this Court had this to say on the subject:

> "When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track be-

[12] Tr. 201-203, 217-220, and 26.

[13] *Texas & P. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266 (1925).

come clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks * * * to be located wholly within one state.' Tracks of that character are commonly constructed, either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. * * * If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of ¶ 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks."

Under the principles laid down in *Texas & Pacific*, then, it is clear that the final test in determining whether proposed trackage constitutes an extension within the meaning of Section 1(18) is whether the effect of the new trackage is to extend substantially the line of a carrier into new territory.

Here, there will be no extension into a new territory by virtue of the construction of the proposed connecting track. Instead, there will be constructed a better connection than the existing one; and that connection merely will permit a better switching operation than is possible over the existing track lay out.

There are, of course, literally thousands of such track connections as we are discussing in this case throughout the United States, and it simply is not conceivable that Congress intended each one of them to be the subject of Commission Section 1(18) approval. To so hold would be to say, in effect, that there is no point to Section 1(22).

A clear method of distinguishing between extensions and new lines, on the one hand, and switching tracks, on the

other, was pointed out by the Supreme Court of Kansas, which said:

"The distinguishing feature between 'extensions' and 'new lines' on the one hand, and 'spur, industrial, team, switching, or side tracks' on the other, as used within 49 U.S.C.A. Sec. 1, pars. 18-22, is this: That the former are tracks over which there are to be train movements in the sense that such movements are a part of the actual transportation haul from shipper to consignee, while the latter named tracks are for use in loading, reloading, storing, and switching the cars, and other things merely incidental to the regular train haul."[14]

Since the Seaboard already has an existing track connection at the location of the new connecting track, and since the operation proposed by the Seaboard will but replace an existing operation, the following language concerning track relocations from another Commission decision also is pertinent:

"We have in the past assumed jurisdiction in those cases of railroad relocation whenever the proposed change concerned service to shippers; the development of new territory or traffic; established more competition or otherwise changed existing competitive situations; affected, more than ordinarily, a carrier's revenues or operating expense; or was related to the matter of rail transportation generally. See *New York Central R. Co. Abandonment and Construction*, 158 I.C.C. 309."

* * *

"The proposed line will perform the same service and be operated in the same manner as the present one. No shippers or shipping stations are involved, and

[14] *Missouri Pacific R. Co.* v. *Chicago, Great Western R. Co.*, 19 Pac. 2d 484, 489 (1933).

there is no invasion of the territory of another carrier or the opening up of any new traffic areas. The competitive situation will remain the same and no changes need be made in tariffs, routings or connections. Under the circumstances we are of the opinion that the proposed construction, abandonment, and acquisition of operating rights over the tracks owned by the City of St. Louis, Mo., constitute a relocation of a track not within our jurisdiction under section 1(18)-(20) of the act. Accordingly, an order will be entered dismissing the application for lack of jurisdiction."[18]

Also, with respect to connecting-track relocations, the following Commission language is pertinent:

"At this point the Union Pacific will construct new connecting tracks and change certain cross-overs to conform to the new operation. Also a portion of the present Union Pacific segment to be used between Liberty and Santa Fe Streets is to be relocated by that carrier in order to provide the applicants with a more direct movement through this busy section of the Union Pacific yards. Such construction will not extend the line of the Union Pacific inasmuch as it amounts to a relocation only of an existing track and furthermore will be used by that carrier only for transfer or switching movements."[19]

There are a whole host of Commission and court decisions on this point. We will not burden this Motion with them. Suffice it to say, however, that the proposed 585-foot connection, being both a relocated track and a switching track, clearly comes within the exemption of Section 1(22) in either category.

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[18] *Missouri Pac. R. Co. Trustee Construction*, 282 I.C.C. 388, 391-392 (1952).

[19] *Chicago, M., St. P. & P. R. Co. Trustees Construction*, 267 I.C.C. 690, 692 (1947).

No Section 1(18) authority has been sought, and none will be sought. The Commission had before it the entire Seaboard proposal.

Finally, one other point requires comment. The Commission's statement that its approval of the Seaboard application was not to be construed as authorization of any "other * * * construction projects,"[17] to which statement the FEC points in its Jurisdictional Statement,[18] neither changes the facts nor suggests that the Commission thinks that the proposed connection requires approval. Contrary to the FEC's argument, the Commission simply did not say that Section 1(18) authority is necessary for construction of the 585-foot connection. It but admonished this appellee that any "*other* essential track construction projects" [emphasis added to "other"] not presented in the Seaboard's proposal might require authority. As the Commission has said before, it has no authority to issue an order regarding facilities over which it has no jurisdiction;[19] and its order regarding this Section 3(5) application is merely said by the Commission not to be construed as a grant of authority to construct a piece of track either over which the Commission has no jurisdiction or about which it has not been informed.

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[17] Commission's Report, page 9.

[18] FEC's Jurisdictional Statement, page 7.

[19] *Hild* v. *Chicago, N.S. & M.R. Co.*, 150 I.C.C. 367, 370-371 (1929), citing, incidentally, the *Texas & Pacific* decision of this Court.

CONCLUSION

In summary, it is clear that the Seaboard need not obtain Interstate Commerce Commission authority to construct the short connecting track which is the subject of the Question presented in this appeal. For that reason, the Commission had before it the entire Seaboard proposal, and its decision regarding that proposal is ripe for appeal.

Assuming, for the sake of argument only, that Commission authority is required before the Seaboard may construct the 585-foot connection, the Commission's outstanding order still is reviewable. That is true for at least two reasons. The first is that the Seaboard may make use of the involved FEC terminal facilities by operating over the existing—though less efficient—connecting track, without ever building the disputed 585-foot connection. Thus, the Commission's order is final, without question. Then, as the lower court pointed out, the Commission's granting of Section 3(5) authority enabling the Seaboard to operate over the FEC's terminal facilities affects appellant adversely and it finally determines the issue of whether the FEC's tracks may be used. That is, the Seaboard's right to use those tracks has been finalized. The legal consequences of the Commission's order under Section 3(5) of the Interstate Commerce Act, therefore, make the order subject to review by the courts.

It is respectfully submitted that the appellant has presented no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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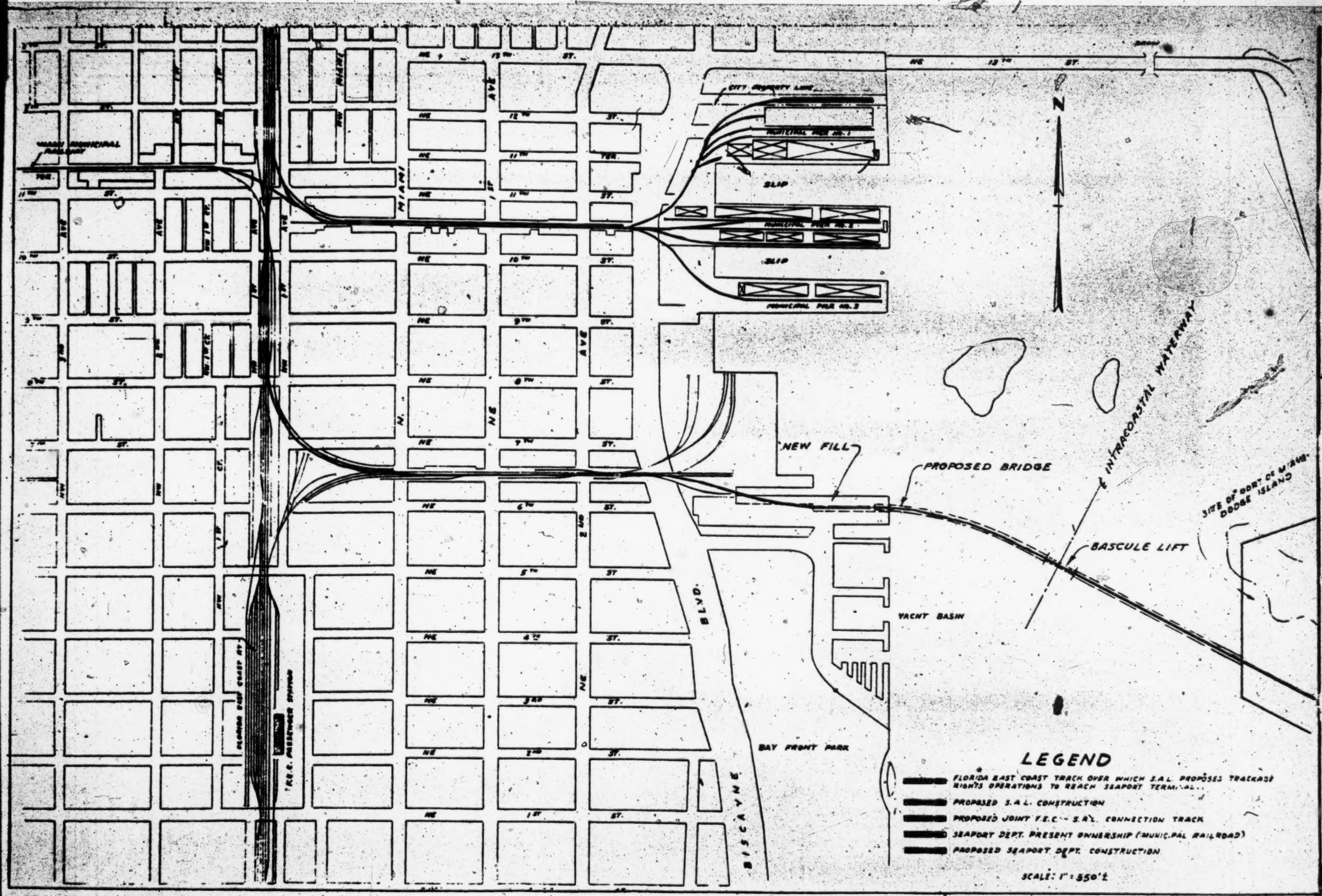
November, 1966.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PROPOSED BRIDGE
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YACHT BASIN
BAY FRONT PARK
FLORIDA EAST COAST AV.
F.E.C. PASSENGER STATION
N
LEGEND
FLORIDA EAST COAST TRACK OVER WHICH S.A.L. PROPOSES TRACKAGE RIGHTS OPERATIONS TO REACH SEAPORT TERMINAL.
PROPOSED S.A.L. CONSTRUCTION
PROPOSED JOINT F.E.C. - S.A.L. CONNECTION TRACK
SEAPORT DEPT. PRESENT OWNERSHIP (MUNICIPAL RAILROAD)
PROPOSED SEAPORT DEPT. CONSTRUCTION
SCALE: 1" = 350'±

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 715

FLORIDA EAST COAST RAILWAY COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (256 F. Supp. 986) dismissing an action brought to set aside an order of the

Interstate Commerce Commission (J.S. App. C). The order authorized the Seaboard Air Line Railroad Company (Seaboard) to use a portion of trackage of the Florida East Coast Railway Company (East Coast) so that Seaboard physically could reach and serve new port facilities at Dodge Island in Miami, Florida.

For thirty-four years, both Seaboard and East Coast have provided rail transportation to and from the present municipal port in Miami (J.S. 10a). When the new facilities now being constructed are completed, all activities will be transferred from the present port to Dodge Island (J.S. 11a). The Seaport Department of Metropolitan Dade County, owner and administrator of the port, contemplated that Seaboard and East Coast should each serve the new larger port with its own equipment (J.S. 11a). The plan was frustrated when East Coast, the only rail carrier with physical connections to the port, refused to permit Seaboard the use of its connecting facilities (J.S. 11a-12a). Seaboard then applied to the Commission under Section 3(5) of the Interstate Commerce Act, 49 U.S.C. 3(5), for permission to operate over 3,220 feet of East Coast's Miami trackage (J.S. 8a), so that it could serve the new port. Seaboard was supported in its application by the Greater Miami Traffic Association, acting on behalf of the port management. East Coast opposed the application.

After hearings, the Commission held (1) that it had jurisdiction over East Coast's tracks under Section 3(5) of the Act; (2) that joint use of the East

Coast tracks would be the most efficient method of serving the new port, and as such would be in the public interest; and (3) that Seaboard's proposed operations over those tracks would be practicable and would not substantially impair East Coast's ability to handle its own business (J.S. 10a; 16a-17a). The Commission ordered the parties to prepare an agreement concerning the terms and compensation for Seaboard's use of East Coast's tracks and retained jurisdiction to resolve any disputes that might arise (J.S. 17a-18a). As of this time, the terms and compensation have not been agreed upon, and the Commission has not been requested to determine them. The Commission in its opinion observed that construction of short connecting tracks to reach the East Coast's tracks would be required (J.S. 12a). But no authorization to construct such trackage had been sought, or was granted.

East Coast brought this district court proceeding to set aside the Commission's order on the ground that the Commission lacked jurisdiction over its trackage. East Coast contended alternatively that the Commission's order lacked finality, and was therefore not subject to judicial review, because (1) the Commission had retained jurisdiction to determine, if necessary, the terms and compensation for Seaboard's use of the East Coast tracks; and (2) the Commission had not yet granted Seaboard authority under Section 1(18) of the Interstate Commerce Act to construct a connecting link to East Coast's trackage.

The three-judge court unanimously affirmed the Commission's decision and order, holding that the

order was final and reviewable (J.S. 3a), that the Commission had jurisdiction over East Coast's trackage (J.S. 3a-4a), and that its findings were supported by substantial evidence (J.S. 5a-6a).

ARGUMENT

The sole issue tendered by appellant for decision by this Court is whether the Commission's order was final and hence judicially reviewable. We submit that it clearly was, and that the appeal does not present a substantial question. The test of finality of administrative orders for purposes of judicial review is whether the order imposes an obligation, denies a right, or fixes some legal relationship. *E.g.*, *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113. That test was met here. The Commission's order determined the entitlement of Seaboard to use East Coast's tracks. That other rights and obligations—the compensation that Seaboard would pay, and whether it should be authorized to build a short connecting track [1]—were left for future determination does not deprive the present order of finality. See, *e.g.*, *American Trucking Assns.* v. *United States*, 355 U.S. 141, 154. Moreover, if appellant believed that the Commission followed an improper procedure in failing to resolve these subsidiary questions at the same time that it determined the basic issue of Seaboard's right to use East Coast's tracks, it should have challenged the order on that

[1] It is not even clear that any such authorization would be required. See 49 U.S.C. 1(22).

ground—not brought a judicial review proceeding and then asked that the proceeding be dismissed because the order was not final. Such a procedure, seemingly designed solely for purposes of delay, should not be condoned.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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DONALD F. TURNER,
Assistant Attorney General.

HOWARD E. SHAPIRO,
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DECEMBER 1966.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 715

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*, *Appellees*.

On Appeal from the United States District Court for the Middle District of Florida

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APPELLANT'S REPLY TO MOTIONS TO AFFIRM

The appellees have moved this Court to affirm summarily the judgment below. Appellees have not, however, suggested any meaningful solution to, nor even met head on, the problems raised by the faulty administrative procedure followed here by the Commission and approved by the court below.

I

Appellees ask this Court to approve an order of the Commission that requires East Coast to permit Sea-

board the use of East Coast tracks that are to be reached via a connecting track, which does not exist and which Seaboard has not requested nor received authority from the Commission to construct.[1] Seaboard suggests that the absence of the "essential" connecting track is of no consequence because

> (1) Seaboard could perform service to Dodge Island via an existing interchange track (Seaboard Motion, pp. 8-9);
>
> (2) the proposed connecting track could be constructed without Commission approval under the exemption in section 1(22) of the Act, 49 U.S.C. § 1(22) (Seaboard Motion, p. 12).[2]

With respect to (1) above, Seaboard has not proposed and the Commission has not approved use of East Coast interchange tracks. With respect to (2) above, Seaboard has failed to apprise the Commission or this Court of the legal and practical problems occasioned by East Coast's ownership of a portion of the land to be traversed by the proposed connection (Tr. 144) and the further adjudication under section 1(20) of the

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[1] The Commission noted in its report that "no application is pending for consideration of other essential track construction projects, nor is our approval of the application here to be construed as authorizing such construction" (327 I.C.C. at 7; JS, Appendix B, p. 15a).

[2] Seaboard, the only appellee taking this position, devotes five pages of its motion to arguing that the proposed construction falls within the section 1(22) exemption (Seaboard Motion, pp. 8-12). That question has not been presented to this Court for resolution. The Commission and the United States acknowledge that they are uncertain whether the section 1(22) exemption is applicable to this construction (Government Motion, p. 4 fn.).

Act that would be occasioned by Seaboard's commencement of construction without appropriate authority.[3]

Seaboard's insistence that it will commence construction without a certificate under section 1(18) only adds to the contingencies outlined at pages 13 and 14 of appellant's jurisdictional statement. The Commission's order could now be implemented only upon the concurrence of those contingent events together with Seaboard's prevailing in a suit under section 1(20). An administrative order whose finality is dependent upon the concurrence of so many contingencies is not ripe for judicial review. *Eccles* v. *Peoples Bank,* 333 U.S. 426, 432 (1948).

II

The Commission and the United States in their motion do not discuss the unresolved practical and legal questions that make a nullity of the apparent determination of legal rights in the challenged order.[4] Instead,

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[3] Section 1(20), 49 U.S.C. § 1(20), provides in pertinent part:

"Any construction . . . contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest" (JS, App. D, p. 42a).

[4] The Government merely asserts that the order is final because it purports to fix a legal relationship and the fact that other rights and obligations are left to future determination does not deprive the order of finality. The two cases relied on by the Government do not support the Government's position here and are of no help to this Court in reviewing the Commission's fragmented procedural approach to this case. In *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948) (Government Motion, p. 4), a majority of this Court held that orders of the Civil Aeronautics Board, which are subject to approval by

the Government joins Seaboard in arguing that the issue of reviewability raised by appellant is invalid because it is an issue more often raised by an appellee (Government Motion, pp. 4-5; Seaboard Motion, p. 4). The Commission and the United States imply that East Coast did not question the Commission's improper procedure prior to judicial review (Government Motion, p. 4). Such an implication is absolutely false. East Coast first challenged the propriety of the Commission deciding the section 3(5) application in the absence of an application for appropriate authority under section 1(18) to construct the essential connection in its exceptions to the report and recommended order of the Commission's hearing examiner. Seaboard, in its reply to exceptions, responded to East Coast's argument on this issue. The Commission's failure to correct its improper procedure at that point left East Coast with no recourse but to protect its rights through judicial review. East Coast has accordingly raised the issue in this Court, as well as in the court below.

The interdependence of the section 1(18)-(22) issues not decided by the Commission[5] and the section 3(5) issue, which the challenged order purports to decide, is inescapable. The issues are not only procedurally in-

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the President, are not subject to judicial review. In *American Trucking Associations* v. *United States*, 355 U.S. 141 (1957) (Government Motion, p. 4), a majority of this Court held that the Commission was empowered to issue an unrestricted certificate under section 207 of the Interstate Commeree Act, 49 U.S.C. § 207, and that the evidence was sufficient to support the Commission's findings.

[5] As pointed out in footnote 2, *supra*, the Commission acknowledges that there is a question whether the construction is subject to section 1(18) or the exemption of section 1(22).

separable, but they must also both be resolved under the more stringent "public convenience and necessity" standard applicable to section 1(18) cases (See JS, p. 6, fns. 1 and 2). The Commission has, in fact, just avoided the same procedural error in another proceeding. In an order served November 1, 1966, in Finance Docket No. 23732,[6] the Commission consolidated interrelated proposals of rail operation under section 1(18) and 3(5), reasoning as follows:

> *It further appearing,* That the proceedings are in terrelated with the said disputed facts relevant to each, and that assignment of the petitions and applications for separate hearing, or dismissal of the section 3(5) application for lack of jurisdiction, or deferred consideration of Eagle's section 1(18) application, would not be conducive to an orderly disposition of the proceedings because of their interrelation and the probable section 3(5) jurisdiction if Eagle's section 1(18) application is granted. (Appendix, *infra,* p. 11)

The Commission could and should have taken similar action in this proceeding.

The Commission's failure to adopt an orderly and rational procedure has resulted in this appeal. The Government alleges—without support—that appellant

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[6] *Southern Pac. Co. Abandonment (Portion) Westwood Branch in Lassen County, California.* The cited order also includes the following directly related proceedings: Finance Docket No. 23910, *Western Pac. R.R.—Purchase (Portion)—Southern Pac. Co.;* Finance Docket No. 24136, *Eagle Lake Lumber Co.—Use of Terminal Facilities of Southern Pac. Co.;* Finance Docket No. 24254, *Eagle Lake Lumber Co.—Acquisition and Operation—Southern Pac. Co.* The Commission's order is reproduced as an appendix to this reply.

has raised the reviewability issue "solely for purposes of delay" (Government Motion, p. 5). Yet, what could be more encouraging of delay and a multiplicity of separate judicial and administrative determinations than the procedure supported by appellees? If appellees prevail, the construction issue will first be determined in a judicial suit under section 1(20) followed by appellate review. If East Coast prevails in that action, the Commission must then decide an application by Seaboard under section 1(18), subject to a separate judicial review by a three-judge district court and another appeal to this Court. These subsequent proceedings and the inconclusive appeal now being presented to this Court would not be necessary had the Commission resolved the section 1(18) issue concurrently with the directly related application under section 3(5).

Appellant has urged repeatedly, to the Commission and the court below, the necessity for simplified treatment of all relevant issues in a consolidated proceeding. The same purpose underlies appellant's present suggestion that this Court vacate the judgment of the District Court and remand the case to that court with directions to review the challenged order when and if it becomes final as a result of further adjudicative determinations. If the contingencies necessary to implementation of the Commission's order occur, judicial review at that time will result in a final determination of all issues relevant to Seaboard's overall proposal for rail operation. If, on the other hand, Seaboard is denied access to the involved tracks as a result of further adjudication, this case can at that time be dismissed as moot. The relief requested by East Coast is precisely that suggested to this Court by the Government in *Baltimore and Ohio Railroad Company, et al.* v.

United States, No. 642, October Term, 1966[7] (Memorandum for the United States, p. 32).

CONCLUSION

Any action taken at this stage of the proceeding will, of course, be less effective than what the Commission could have accomplished by adopting a proper procedure here in the first instance. This fact should not, however, detract from the advantages inherent in appellant's suggestion to this Court. The action recommended assures that the reviewing court below will have before it for decision in a single proceeding all relevant and decisive issues raised by Seaboard's total proposal of rail service to Dodge Island.

Respectfully submitted,

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January 1967

[7] This is the lead docket of three appeals challenging the merger of the Pennsylvania Railroad Company and the New York Central Railroad Company.

APPENDIX

Order

Service Date
November 1, 1966

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 25th day of October, 1966.

Finance Docket No. 23732

SOUTHERN PACIFIC CO. ABANDONMENT (PORTION) WESTWOOD BRANCH IN LASSEN CO., CALIF.

Finance Docket No. 23910

WESTERN PACIFIC RAILROAD CO.—PURCHASE (PORTION)—SOUTHERN PACIFIC CO.

Finance Docket No. 24136

EAGLE LAKE LUMBER COMPANY—USE OF TERMINAL FACILITIES OF SOUTHERN PACIFIC CO.

Finance Docket No. 24254

EAGLE LAKE LUMBER CO.—ACQUISITION AND OPERATION—SOUTHERN PACIFIC CO.

Upon consideration of (1) the record in these proceedings, (2) the petitions of Eagle Lake Lumber Company (Eagle) for leave to file its petitions, for leave to intervene, to supplement the record and for reconsideration and modification of the order of Finance Board No. 3, dated March 31, 1966, approving the abandonment in Finance Docket No. 23732, (3) the reply to the petitions by Southern Pacific Company (Southern Pacific), (4) the application in Finance Docket No. 24136 by Eagle for an order under section 3(5) of the Interstate Commerce Act requiring Southern Pacific to permit applicant to use certain of its terminal facilities, (5) the motion to dismiss the application in Finance Docket No. 24136 by Southern Pacific,

(6) the reply by Eagle to the motion to dismiss, (7) the application filed in Finance Docket No. 24254 by Eagle under section 1(18) of the act for a certificate authorizing acquisition and operation by Eagle of the line proposed to be abandoned in Finance Docket No. 23732, (8) the protests to the Finance Docket No. 24254 application by Southern Pacific, the Railway Labor Executives' Association, and the Brotherhood of Locomotive Engineers, and (9) Eagle's July 20, 1966, letter petition requesting deferred processing of the Finance Docket No. 24254 application;

It appearing, That the petitioner in Finance Docket No. 23732, Eagle, suffered a major fire in 1965 which resulted in uncertainty concerning its future business activities and rebuilding program, and contributed to its failure to timely note Southern Pacific's abandonment notice and to timely protest the abandonment, that averments made by petitioner are reasonably pertinent to the issues already presented and that good cause is shown for granting Eagle leave to file its petitions and to intervene in this matter; and

It further appearing, That Eagle requests the said certificate and order in F. D. No. 23732 be modified by imposing a condition that the line to be abandoned be sold to any responsible party interested in maintaining a transportation service thereon for a consideration not less than the net salvage value of the property sought to be acquired; and that Southern Pacific in reply (1) disputes facts alleged by Eagle, and objects to their being received as evidence, (2) contends Eagle's use is speculative, and (3) states the requested condition would be against the public interest;

It further appearing, That Eagle in Finance Docket No. 24136 requests an order under section 3(5) requiring Southern Pacific to permit Eagle to use certain of its terminal facilities, including main line tracks, at Susanville, Calif., adjacent to the line proposed to be abandoned, that

applicant is not a common carrier by railroad and that our jurisdiction under section 3(5) is limited to such carriers; but that, in the event the related application in Finance Docket No. 24254 is granted and Eagle assumes the carrier status, probable jurisdiction would be present under section 3(5); and,

It further appearing, That the proceedings are interrelated with the said disputed facts relevant to each, and that assignment of the petitions and applications for separate hearing, or dismissal of the section 3(5) application for lack of jurisdiction, or deferred consideration of Eagle's section 1(18) application, would not be conducive to an orderly disposition of the proceedings because of their interrelation and the probable section 3(5) jurisdiction if Eagle's section 1(18) application is granted:

It is ordered, That the proceedings in Finance Docket Nos. 23732 and 23910 be, and they are hereby, reopened, and that the petition for leave to file the petitions in Finance Docket 23732 be, and it is hereby, granted, and that the petition for leave to intervene be, and it is hereby, granted.

It is further ordered, That Eagle in Finance Docket No. 24254 be, and it is hereby, directed to proceed with service of its application and give other notice thereof as required by Title 49, Sec. 41.2(c) of the Code of Federal Regulations (CFR), and to file with the Commission within 30 days from the date of service of this order, the Return to the Questionnaire, and give notice thereof as required by Title 49, Sec. 41.2(d) of the CFR;

It is further ordered, That the above-entitled proceedings be, and they are hereby, assigned for consolidated hearing at a time and place hereafter to be set.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

FLORIDA EAST COAST RAILWAY CO. *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

No. 715. Decided February 13, 1967.

PER CURIAM.

The motion of Dade County et al. to join Seaboard Air Line Railroad Company in the motion to affirm is granted.

The motions to affirm are granted and the judgment is affirmed.